No. 2888-2889

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

TAKAO OZAWA,
Appellant,
v.
THE UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLANT

DAVID L. WITHINGTON,
JOSEPH LIGHTFOOT,
Attorneys for TAKAO OZAWA,
Petitioner.

CASTLE & WITHINGTON,
LIGHTFOOT & LIGHTFOOT,
Of Counsel.

Filed
MAY 9 - 1917
F. D. Monckton,
Clerk.

INDEX

	Page.
Statement of the Case	1
The Issue	2
The Statute	3
Sections of Title XXX, Revised Laws, United States, Not Expressly Repealed	7
Subsequent Acts of Congress	8
Decision of the Court Below	9
Argument	10
I. This Court has jurisdiction of the appeal	10
II. The Act of June 29, 1906, establishes a uniform rule of Naturalization, and that rule is not controlled or modified by Section 2169	19
(a) *The constitutional grant of power, the title of the act and its scope show that it is a complete and exclusive rule, save in definitely excepted cases, for naturalization*	19
(b) *The unrepealed sections of Title XXX provide for the naturalization of cases excepted from uniform law*	22
(c) *Section 2169 in terms is applicable to the excepted cases of Title XXX, and not to the uniform law provided by the Act of June 29, 1906*	24
(d) *The history of Section 2169 and subsequent legislation and decision is inconsistent with the view that it is a restriction on the general terms of the Act of June 29, 1906*	27
(e) *The decided cases in the Federal courts, appearing to so hold, do not in fact hold Section 2169 applicable to the Act of June 29, 1906, and the cases cited to this point are not decisive of it*	30
(f) *The related cases in this court are inconsistent with Section 2169 being applicable to the Act of June 29, 1906*	33
(g) *A comparison of the legislation in reference to immigration, including the recent act, shows that the policy of Congress is to exclude undesirable citizens and the Chinese, and that Congress has industriously refrained from any action placing or tending to place the Japanese in the same class with the Chinese*	35
(h) *This view is enforced by the existing treaty with Japan*	39
(i) *The immigration act of February 5, 1917, and the circumstances of its passage in Congress show the clear intention of that body to make no declaration that Japanese are excluded from naturalization*	40
III. Section 2169, if applicable to the Act of June 29, 1906, must be construed as meant in the Act of March 26, 1790, and, so construed, "Free White Persons" means one not black, not a Negro, which does not exclude Japanese	46
(a) *Section 2169, if considered as a re-enactment of the earlier law, is to be construed in the light of, and with the meaning of, the original Act of March 26, 1790*	46

PAGE.

(b) *So construed, the words "free white persons" in the Act of March 26, 1790, means free whites as distinct from blacks, whether slave or free* 47

(c) *"White person," as construed by the Supreme Court of the United States and by the State courts, means a person without negro blood* 53

(d) *The primary definition of these words, as given by the great dictionaries, is one who is white, not black, nor a negro* .. 55

(e) *The insertion by Congress of the word "free" in Section 2169 in 1875, a word which had a definite meaning in 1790, but has no meaning if construed as a new enactment in 1875, shows the intention to re-enact the old section with the old meaning* 56

IV. If Section 2169 is to be construed as a new enactment, and not in the light of its original meaning, then it is not a limitation, but simply a declaration that the act applies to the classes named 57

V. Giving the words "Free White Persons" their common and popular acceptation in 1875, no definite rule can be laid down, based on color, race or locality of origin, and there is nothing in the laws of the United States, its treaties, in the history of the time, or the proceedings of Congress, to show that Japanese were intended to be excluded 59

(a) *Up to 1875, there had been no Japanese immigration, no suggestion of their exclusion, and America had recently opened Japan to the western civilization, which Japan was gladly welcoming* 60

(b) *Judicial construction of the phrase up to 1875 does not sustain such an exclusion* 61

(c) *No intelligent rule, applicable to all cases, can be drawn from the decisions since 1875* 63

VI. The words "Free White Persons," neither in their common and popular meaning, nor in their scientific definition, define a race or races or prescribe a nativity or locus of origin. They deal with personalities and the qualities of personalities, and are only susceptible of meaning those persons fit for citizenship and of the kind admitted to citizenship by the policy of the United States 67

VII. The Japanese are "free." They are "White Persons," having European and Aryan root stocks. They are a superior people, fit for citizenship 68

VIII. The Japanese are assimilable 79

CONCLUSION 85

CASES CITED

PAGE.

Ah Chong, In re, 2 Fed. 733 29
Ah Yup, re, 5 Sawy. 155 .... 61, 63
Akhay Kumar Mozumdar, In re, 237 Fed. 115 .... 29, 64
Alverto, In re, 198 Fed. 688 .... 32, 33, 64
Americana, Vol. 1, Anthropology 48

Bessho v. United States, 178 Fed. 245 .... 31, 32, 66
Black on Judgment, vol. 2, secs. 500, 504, 534a 12, 18
Brefo, In re, 217 Fed. 131 22
Buntaro Kumagai, In re, 163 Fed. 922 65

Camille, In re, 6 Fed. 256 .... 55, 64
Campbell v. Gordon, 6 Cranch, 176 15
Century Dictionary 55
Chisholm v. Georgia, 2 Dall. 431 17
Crenshaw v. United States, 134 U. S. 99 46

Dow, In re, 213 Fed. 355 .... 38, 48, 64
Dow v. United States, 226 Fed. 145 .... 10, 14, 29, 48, 64
Dred Scott v. Sandford, 19 Haw. 393 .... 54, 55
Durousseau v. United States, 6 Cranch, 307 20
Du Val v. Johnson, 39 Ark. 182 55

Enc. Brit. vol. 2, pp. 61, 113, 114 69
" " " 9, p. 851 69
" " " 11, p. 635 70

Fong Yue Ting v. United States, 149 U. S. 698 .... 14, 35

Gee Hop, In re, 71 Fed. 274 .... 40, 61

Halladjian, In re, 174 Fed. 834 .... 53, 57
Hamilton v. Rathbone, 175 U. S. 414 47
Harmon v. United States, 223 Fed. 425 14
Hawks' Narrative 71
Hogan v. Kurtz, 94 U. S. 773 15
Holmgren v. United States, 217 U. S. 507 16
Hong Yen Chang, 84 Cal. 163 64

Johannessen v. United States, 225 U. S. 227 .... 13, 18

Kanaka Nian, In re, 6 Utah 259, 21 Pac. 993 66
Kang-Gi-Shun-Ca, In the matter of, 109 U. S. 556 46
Kent's Commentaries, vol. 2, p. 72 63
Knight, In re, 171 Fed. 299 66

Lampitoe, In re, 232 Fed. 382 33
Lapina v. Williams, 232 U. S. 78 .... 39, 58
Leichtag, In re, 211 Fed. 681 23
Loftus, In re, 165 Fed. 1002 .... 23, 24
Lopez, In re Monico, Supreme Court, District of Columbia 33
Low Wah Suey v. Backus, 225 U. S. 460 63
Luria v. United States, 231 U. S. 9 12
Lynch v. Clarke, 1 Sandf. 583 .... 62, 66

PAGE.

Marbury v. Madison, 1 Cranch, 137 17
McDonald v. Hovey, 110 U. S. 619 46
Mudarri, In re, 176 Fed. 465 65
Muskrat v. United States, 219 U. S. 346 17

Pacific R. Commission, In re, 32 Fed. 241 17
Pennsylvania v. Wheeling & B. Bridge Co., 18 How. 421 18
Pennsylvania R. Co. v. International Coal Min Co., 230 U. S. 184 58
People v. Elyea, 14 Cal. 145 63
People v. Hall, 4 Cal. 399 62

Rodriguez, In re, 81 Fed. 337 66

Saito, In re, 62 Fed. 126 65
San C. Po, In re, 28 N. Y. Supp. 383 64
Shahid, Ex parte, 205 Fed. 812 .... 47, 64
Southern P. R. Co. v. United States, 168 U. S. 1, 48 12
Spratt v. Spratt, 4 Pet. 393 .... 12, 15
Standard Dictionary 55
Stark v. Chesapeake Insurance Co., 7 Cranch, 420 15
Sterbuck, In re, 224 Fed. 1012 24

Tancrel, In re, 227 Fed. 329 24
Thomas v. Loney, 134 U. S. 372 15
Tucker's Bl. Com. App. vol. 1, p. 420 17

United States v. Balsaro, 180 Fed. 694 .... 29, 32, 33
United States v. Cohen, 179 Fed. 834 14
United States v. Dolla, 177 Fed. 101 .... 10, 11, 13, 15
United States v. George, 164 Fed. 45 14
United States v. Klein, 13 Wall. 128 18
United States v. LeBris, 121 U. S. 278 46
United States v. Lengyel, 220 Fed. 720 24
United States v. Lenore, 207 Fed. 865 14
United States v. Mulvey, 232 Fed. 513 11
United States v. Neugebauer, 221 Fed. 938 11
United States v. Perryman, 100 U. S. 235 54
United States v. Peterson, 182 Fed. 289 .... 15, 24
United States v. Rockteschell, 208 Fed. 530 35
United States v. Rodiek, 162 Fed. 469 14
United States v. Ryder, 110 U. S. 729 46
United States v. Spohrer, 175 Fed. 440 13
United States v. Wong Kim Ark, 169 U. S. 649 .... 16, 21
United States v. Wong You, 223 U. S. 67 38

Webster's Dictionary 55, 56

Yamashita, In re, 30 Wash. 234, 70 Pac. 482 66
Yamataga v. Fisher, 189 U. S. 86 .... 39, 40
"Yamato, Dolemen Age," Dr. N. Gordon Munro 72
Young, In re, 198 Fed. 716 9
Yunghauss v. United States, 218 Fed. 168 14

NO. 2888-2889

United States Circuit Court of Appeals for the Ninth Circuit

TAKAO OZAWA,
Appellant,
v.
THE UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLANT

STATEMENT OF THE CASE.

This is an appeal from an order of the United States District Court for the District of Hawaii denying the petition for naturalization of the appellant, Takao Ozawa. The petition and affidavits of the petitioner and his witnesses were in due form, and showed his residence in Honolulu, in the Territory of Hawaii; his occupation; his birth in Japan on the 15th day of June, A. D. 1875; his emigration on the 17th day of July, 1894; that he declared his intention before the Superior Court of the County of Alameda, State of California, on the 1st day of August, A. D. 1902; that he is married and has two children, both born in Hawaii; and that he is not a disbeliever in or opposed to organized government

or a member of or affiliated with any organization or body of persons teaching disbelief in or opposed to organized government; that he is not a polygamist nor a believer in the practice of polygamy; that he is attached to the principles of the Constitution of the United States, and renounces his allegiance and fidelity to the Emperor of Japan; that he is able to speak the English language, and has resided continuously in the United States since the 29th day of July, A. D. 1894. (Tr., pp. 5-7.)

The petition for naturalization was opposed by the United States District Attorney on the sole ground that the applicant was "a person of the Japanese race and born in Japan," and therefore not eligible to naturalization under Revised Statutes, Section 2169.

"The other qualifications are found by the Court to be fully established, and are conceded by the Government. Twenty years' continuous residence in the United States, including over nine years' residence in Hawaii, graduation from the Berkeley (Cal.) High School, nearly three years' attendance at the University of California, the education of his children in American schools and churches, the maintenance of the English language in his home, are some of the facts in his behalf. And he has presented two briefs of his own authorship, in themselves ample proof of his qualifications of education and character. (Tr., p. 19.)

THE ISSUE.

The issue made by the United States Attorney and decided by the court is whether "a person of the

Japanese race and born in Japan" is eligible to citizenship under Revised Statutes, Section 2169.

The true issues are:

(1) Is the Act of June 29, 1906, providing for a uniform rule for the naturalization of aliens, as amended, complete in itself, or is it impliedly limited by Section 2169, which in terms does not apply to the Act? and

(2) Whether a Japanese "born in Japan" is eligible to citizenship within the limitations of that section, which, so far as it is applicable to the case at bar, deals, not with races, but with persons.

THE STATUTE.

Title XXX of the Revised Statutes is not the statute under which the proceedings were had. The statute in question is that of June 29, 1906 (34 Stat. L., Part I, p. 596), as subsequently amended, which is entitled:

"An Act to establish a Bureau of Immigration and Naturalization, and to provide for a uniform rule for the naturalization of aliens throughout the United States."

This Act is complete in itself and provides, not only the *"uniform rule for the naturalization,"* but the conditions for naturalization. It provides in Section 3:

"That the naturalization jurisdiction of all courts herein specified, State, Territorial, and Federal,

shall extend only to aliens resident within the respective judicial districts of such courts."

and continues:

"Sec. 4. That an alien may be admitted to become a citizen of the United States in the following manner and not otherwise:"

First. A preliminary declaration of intention must be made at least two years prior to admission by an alien who has reached the age of eighteen years.

"And such declaration shall set forth the name, age, occupation, personal description, place of birth, last foreign residence and allegiance, the date of arrival, the name of the vessel, if any, in which he came to the United tates, and the present place of residence in the United States of said alien: *Provided, however,* That no alien who, in conformity with the law in force at the date of his declaration, has declared his intention to become a citizen of the United States shall be required to renew such declaration."

Second. A petition in writing be filed, signed and verified, stating full name, residence, occupation, date and place of birth, place from which he emigrated, date and place of arrival in United States, name of the vessel, time and court where he declared his intention, name of wife and country of her nativity, place of residence; name, place, birth and residence of children. He must set forth that he is not a disbeliever in or opposed to organized government, or a member of or affiliated with any organization

teaching disbelief in or opposed to organized government, or a polygamist or believer in polygamy, and his intention to become a citizen and to renounce allegiance to any foreign prince, potentate, state or sovereignty of which he may be a subject.

"and every fact material to his naturalization and required to be proved upon the final hearing of his application."

Provision is also made for affidavits of two credible witnesses who have personal knowledge of petitioner.

Third. He must renounce his allegiance as aforesaid.

Fourth. It must appear to the court that the alien has resided continuously in the United States for five years, and in the Territory for one year, and behaved as a man of good moral character, attached to the principles of the Constitution, and well disposed to the good order and happiness of the same; with the testimony of at least two witnesses on the facts of residence, moral character and occupation; and

Fifth. He must renounce any hereditary title or order of nobility.

By Section 5 the clerk posts in an appropriate place the name, nativity and residence of the alien, with particulars of his arrival in the United States and the date of the final hearing and the names of the witnesses.

Section 7 provides that no one who is a disbeliever

in organized government, or who advocates or teaches the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers of this Government or any other organized government, or who is a polygamist, shall be naturalized.

Section 8 provides that no alien, with certain exceptions, shall hereafter be naturalized who cannot speak the English language.

By Section 11 the United States has the right to appear, cross-examine, call witnesses, and be heard in opposition.

Section 12 provides for notice to the Bureau of Naturalization, and reports to it.

Section 15 provides for suits to cancel certificates of citizenship on the ground of fraud or where illegally procured, and provides in certain cases what shall be *prima facie* evidence of fraud.

Section 26 provides:

"That sections twenty-one hundred and sixty-five, twenty-one hundred and sixty-seven, twenty-one hundred and sixty-eight, twenty-one hundred and seventy-three of the Revised Statutes of the United States of America, and section thirty-nine of chapter one thousand and twelve of the Statutes at Large of the United States of America for the year nineteen hundred and three, and all acts or parts of acts inconsistent with or repugnant to the provisions of this act are hereby repealed."

Section 27 provides the forms for declaration of intention, petition, affidavits and certificates. There is no reference in any of these to race or color, excepting in the declaration of intention, where color is

a part of the personal description with "height, weight, color of hair, color of eyes, and other visible distinctive marks."

The petition for naturalization, which must set forth "every fact material to his naturalization and required to be proved upon the final hearing of his application," contains nothing in reference to color or race.

The final section provides:

"Sec. 30. That all the applicable provisions of the naturalization laws of the United States shall apply to and be held to authorize the admission to citizenship of all persons not citizens who owe permanent allegiance to the United States, and who may become residents of any State or organized Territory of the United States, with the following modifications: The applicant shall not be required to renounce allegiance to any foreign sovereignty; he shall make his declaration of intention to become a citizen of the United States at least two years prior to his admission; and residence within the jurisdiction of the United States, owing such permanent allegiance, shall be regarded as residence within the United States within the meaning of the five years' residence clause of the existing law."

SECTIONS OF TITLE XXX, REVISED LAWS, UNITED STATES, NOT EXPRESSLY REPEALED.

The only sections of Title XXX not expressly repealed are Section 2166 exempting honorably discharged soldiers from a previous declaration of intention, and the necessity of proof of but one year's residence in the United States; Section 2170, pro-

viding for a continuous residence of five years, which seems, however, to be fully covered by that Act (Section 4); Section 2171, prohibiting the naturalization of alien enemies, which section contains the anomaly of supposing that any alien would apply who had made a declaration before June 18, 1812; Section 2174, making provision for the naturalization of aliens who have served three years on a merchant vessel of the United States subsequent to the date of the declaration of intention, and extending the protection of American citizenship to such seamen, although unnaturalized; and Section 2169,

> "The provisions of this Title shall apply to aliens being free white persons and to aliens of African nativity and to persons of African descent."

SUBSEQUENT ACTS OF CONGRESS.

Subsequent legislation of Congress has no material bearing. This legislation includes: Act of March 2, 1907 (34 Stat. L., pt. 1, p. 1228), providing for the expatriation of citizens and the protection of citizens when abroad; Act of June 25, 1910 (36 Stat. L., pt. 1, p. 830), authorizing the naturalization of aliens who, supposing they were citizens of the United States, had exercised rights as such in good faith, without proof of former declaration; Act of February 24, 1911 (36 Stat. L., pt. 1, p. 929), providing for the naturalization of the widow and minor children of one who declared his intention, and make a homestead entry, without any declaration of intention; Act of June 30, 1914 (38 Stat. L., pt. 1, p. 395),

dispensing in the case of honorably discharged, or discharged with the recommendation of re-enlistment, sailors from the Navy, Marine Corps, Revenue-Cutter Service and the naval auxiliary service, without proof of good moral character and previous declaration; and further authorizing the admission of any such sailor who has completed four years of honorable service without such previous declaration. This Act contains the following proviso:

"Provided further, That any court which now has or may hereafter be given jurisdiction to naturalize aliens as citizens of the United States may immediately naturalize any alien applying under and furnishing the proof prescribed by the foregoing provisions."

the language of which would authorize the naturalization of any alien who came within the foregoing definition. There are also validating acts of no particular importance.

DECISION OF THE COURT BELOW.

It is a little difficult to determine the exact ground on which the court below rests its decision, farther than its finding that "petitioner is not qualified under Revised Statutes, Section 2169." Apparently it is based on the reasoning that this section applies, and that, as laid down by Judge Cushman *In re Young,* 198 Fed. 716, "The term 'white person' must be given its common or popular meaning," and so construed it would include the European races and those Caucasians belonging to races around the Med-

iterranean Sea, and whatever race the Japanese may be, "they are not included in what are commonly understood as 'white persons.'" As the learned Judge added to the Young case a reference to *Dow v. United States,* 226 Fed. 145, 147, it is probable that he arrived at this conclusion on the ground stated in that case, that the statute must be construed in the light of "the more definite and general knowledge and conception which must be attributed to the legislators" of 1870 to 1875.

ARGUMENT.

I.

THIS COURT HAS JURISDICTION OF THE APPEAL.

This cause was contested in the lower court, the United States District Attorney, its authorized representative, appearing and contesting the question involved in this appeal. We may therefore reject the class of cases which hold that a "case," as defined in the Court of Appeals Act giving jurisdiction to this court in appeals from final decisions, is confined to a contested proceeding.

The question has never been passed upon in this circuit, has never been decided by the Supreme Court of the United States, but has been decided adversely to the right of appeal in the Sixth Circuit.

United States v. Dolla, 177 Fed. 101.

And this has been followed in the Third Circuit, chiefly on the ground of conformity.

United States v. Neugebauer, 221 Fed. 938.

There are also some expressions, not necessary for decision, in a case in the Second Circuit in which the majority held that a proceeding to cancel a naturalization certificate would lie, although at the original hearing a representative of the Bureau of Naturalization appeared and contested the proceeding on the same ground, the court, however, holding that he did not represent the United States, that he was not a law officer, and referred incidentally to *United States v. Dolla,* ubi supra, and *United States v. Neugebauer,* saying, however:

"And the question is not now before us, and we express no opinion one way or the other concerning it."

Judge Hough, dissenting, held that the court in numerous cases, since the Dolla case, cited by him, had assumed jurisdiction, saying:

"There was no difficulty in reviewing this naturalization order by an appeal from a chancery decree."

United States v. Mulvey, 232 Fed. 513.

Proceedings similar to that in *United States v. Mulvey* have been before the Supreme Court of the United States in two cases. In the latter of these cases it was held that the proceeding to cancel the certificate was equitable in its nature, that it applied to certificates of naturalization issued under Title XXX of the Revised Laws, as well as under

the Act of 1906, that it was a beneficent provision, and a distinction is clearly made between the Act of 1906 and "the naturalization laws preceding the Act of 1906."

Luria v. United States, 231 U. S. 9.

In the earlier case the original petition for naturalization was also not contested, and the naturalization papers were issued prior to the Act of 1906. In that case Mr. Justice Pitney, after citing the opinion of Chief Justice Marshall that the judgment of a court on the question of naturalization

"was like every other judgment, complete evidence of its own validity. *Spratt v. Spratt,* 4 Pet. 393, 408."

held that Congress nevertheless was authorized to make a direct attack in case of fraud or illegality in a case where no issue had been raised in the original application, saying, however:

"What may be the effect of a judgment allowing naturalization in a case where the government has appeared and litigated the matter does not now concern us. See 2 Black, Judgm., Sec. 534a. What we have to say relates to such a case as is presented by the present record, which is the ordinary case of an alien appearing before one of the courts designated by law for the purpose, and, without notice to the government, and without opportunity, to say nothing of duty, on the part of the government to appear, submitting his application for naturalization with *ex parte* proofs in support thereof, and thus procuring a certificate of citizenship."

citing 2 Black, Judgm., Secs. 500, 504, and citing Mr. Justice Harlan in *Southern P. R. Co. v. United States,* 168 U. S. 1, 48, that it is a right, question, or

fact distinctly put in issue and directly determined to which the doctrine of *res judicata* applies, and holding that a certificate of naturalization procured *ex parte* in the ordinary way was open to attack as a public grant of land or a patent for an invention; and citing the opinion of Judge Cross in *United States v. Spohrer,* 175 Fed. 440, as pertinent:

"An alien friend is offered, under certain conditions, the privilege of citizenship."

and again, to the effect that the government, when authorized by Congress, has the right to recall

"where it has conferred a privilege in answer to the prayer of an *ex parte* petitioner."
Johannessen v. United States, 225 U. S. 227.

United States v. Dolla, ubi supra, has been criticized in a very able opinion by Judge Amidon in the District Court of the United States for North Dakota in a proceeding to cancel a certificate of citizenship, in which he reviews the history of the passage of the Act of 1906, holding, and in this he is sustained by other decisions, that " 'illegally procured' imports, not an error of court, but willful misconduct," and citing numerous cases from the Second, Fourth, Third, Seventh and Eighth Circuits in which, since the decision in the Dolla case, errors committed in the exercise of the jurisdiction to naturalize have been corrected on appeal; citing also the well-known definition of "a case" by Mr. Justice Field (32 Fed. 255), and citing a case of deportation under the im-

migration laws in which the Supreme Court has said:

"When, in the form prescribed by law, the executive officer, acting in behalf of the United States, brings the Chinese laborer before the judge, in order that he may be heard, and the facts upon which depends his right to remain in the country be decided, a case is duly submitted to the judicial power; for here are all the elements of a civil case—a complainant, a defendant and a judge—*actor, reus, et judex.*"

Fong Yue Ting v. United States, 149 U. S. 698, 728.

and concluding that an error of the court, not brought about by any fraud or deception, is not an illegal practice and does not come within Section 15 of the Act of June 29, 1906.

United States v. Lenore, 207 Fed. 865.

This court has exercised its jurisdiction on a similar appeal from the same District Court.

United States v. Rodiek, 162 Fed. 469.

To the cases cited by Judge Amidon can be added:

United States v. George, 164 Fed. 45 (Second Circuit).

United States v. Cohen, 179 Fed. 834 (Second Circuit).

Yunghauss v. United States, 218 Fed. 168 (Second Circuit).

Dow v. United States, 226 Fed. 145 (Fourth Circuit).

Harmon v. United States, 223 Fed. 425 (First Circuit).

United States v. Peterson, 182 Fed. 289 (Eighth Circuit).

Little needs to be added to the convincing opinion of Judge Amidon that the conclusion in *United States v. Dolla* is wrong.

It has been settled law since the rule laid down in the Supreme Court by Chief Justice Marshall that

"The various acts upon the subject submit the decision on the right of aliens to admission as citizens to courts of record. They are to receive testimony, to compare it with the law, and to judge on both law and fact. This judgment is entered on record as the judgment of the court. It seems to us, if it be in legal form, to close all inquiry; and, like every other judgment, to be complete evidence of its own validity."

Spratt v. Spratt, ubi supra.

This doctrine has been consistently sustained by that court down to and including the Johannessen case cited above.

The fact that the action of a court upon a naturalization petition is a judgment and has all the conclusive effects of a judgment had been held much earlier.

Stark v. Chesapeake Insurance Co., 7 Cranch 420.

Campbell v. Gordon, 6 Cranch 176.

The proceeding for naturalization is a judicial proceeding in a court.

Thomas v. Loney, 134 U. S. 372.

Hogan v. Kurtz, 94 U. S. 773.

The authority of Congress is exercised "by enabling foreigners individually to become citizens by proceedings of the judicial tribunals."

United States v. Wong Kim Ark, 169 U. S. 649, 703.

The whole question has been exhaustively considered and decided by that court in a case affirming a judgment of this court, in which it was held that the Constitution gave power to confer jurisdiction upon the courts of a State and incidentally on the courts of the United States in naturalization matters, and that this had been done.

Holmgren v. United States, 217 U. S. 507.

By the Constitution, Article 3, Section 2, it is provided:

"The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made * * * to controversies to which the United States shall be a party."

and it has been settled by a long line of decision

"That neither the legislative nor the executive branches can constitutionally assign to the judicial any duties but such as are properly judicial, and to be performed in a judicial manner."

and that Congress cannot enlarge the right given by the Constitution in the section quoted.

"As we have already seen, by the express terms of the Constitution, the exercise of the judicial power is limited to 'cases' and 'controversies.' Beyond this

it does not extend, and unless it is asserted in a case or controversy within the meaning of the Constitution, the power to exercise it is nowhere conferred.

"What, then, does the Constitution mean in conferring this judicial power with the right to determine 'cases' and 'controversies'? A 'case' was defined by Mr. Chief Justice Marshall as early as the leading case of *Marbury v. Madison,* 1 Cranch 137, 2 L. ed. 60, to be a suit instituted according to the regular course of judicial procedure. And what more, if anything, is meant in the use of the term 'controversy'? That question was dealt with by Mr. Justice Field, at the circuit, in the case of Re Pacific R. Commission, 32 Fed. 241, 255. Of these terms that learned justice said:

" 'The judicial article of the Constitution mentions cases and controversies. The term "controversies," if distinguishable at all from "cases," is so in that it is less comprehensive than the latter, and includes only civil suits of a civil nature. *Chisholm v. Georgia,* 2 Dall. 431, 432, 1 L. ed. 445, 446; 1 Tucker's Bl. Com. App. 420, 421. By cases and controversies are intended the claims of litigants brought before the courts for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs. Whenever the claim of a party under the Constitution, laws, or treaties of the United States takes such a form that the judicial power is capable of action upon it, then it has become a case. The term implies the existence of present or possible adverse parties, whose contentions are submitted to the court for adjudication."

> *Muskrat v. United States,* 219 U. S. 346, 356, 357.

The case at bar is not only a case but a controversy, and in either event the language of the Court of Appeals Act must be held to use the word "case"

in the sense in which the Constitution uses it in the section granting the power to Congress to enact that Act.

The judicial power is only exercised in the decision of cases.

Pennsylvania v. Wheeling & B. Bridge Co., 18 How. 421.

in which it is supreme over the legislative power.

United States v. Klein, 13 Wall. 128.

As the action of the United States Court in naturalization matters is judicial, and as Congress cannot extend the judicial power beyond the right given by the Constitution which extends only to cases and controversies, and as the word "case" includes a controversy, and as this court is given jurisdiction by the Court of Appeals Act in cases in the United States District Court of Hawaii, as well as in other district courts, there can be no question but what the Dolla case is an ill-considered decision and that this court has jurisdiction. The Supreme Court of the United States, indeed, seems to have gone beyond this, for although the court in *Johannessen v. United States,* ubi supra, refrains from deciding the question whether an action would lie under Section 15 of the Act of 1906 to cancel a judgment of naturalization, where the United States had appeared and litigated the question, the citation in the opinion by Mr. Justice Holmes of Black on Judgment, Section 534a, which lays down the rule that if the United States appears and litigates a question in a case it is for-

ever estopped by the judgment, unless it procures its reversal on appeal, strongly indicates the opinion of that court.

It is immaterial in the consideration of this case whether the review is by appeal or writ of error, as, by stipulation, case No. 2889 is to be heard and determined on the printed record in this cause, and the cases are consolidated for hearing and one brief filed covering both cases.

II.

THE ACT OF JUNE 29, 1906, ESTABLISHES A UNIFORM RULE OF NATURALIZATION, AND THAT RULE IS NOT CONTROLLED OR MODIFIED BY SECTION 2169.

(a) *The constitutional grant of power, the title of the Act and its scope show that it is a complete and exclusive rule, save in definitely excepted cases, for naturalization.*

The Constitution of the United States provides, Article I, Section 8:

> "The Congress shall have Power * * *
> "To establish an uniform Rule of Naturalization * * *
> "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, * * *

Congress exercised this power in the first Congress, in its second session, and passed the Act of March 26, 1790 (1 Stat. L. 103), entitled:

"An Act to establish an uniform rule of naturalization," This Act was repealed by a like Act with a like title in 1795, and that by the Act of April 14, 1802 (2 Stat. L. 153), which in turn was entitled:

"An Act to establish an uniform rule of naturalization." This in turn became Title XXX of the Revised Statutes of the United States, which comprised the uniform rule of naturalization until the passage of the Act of June 29, 1906, which purports to be and is entitled:

"An Act to establish a Bureau of Immigration and Naturalization, and to provide for a uniform rule for the naturalization of aliens throughout the United States."

To recapitulate, the Constitution grants to Congress the power "To establish an uniform Rule of Naturalization." The various Acts of Congress which have exercised this power from the Act of the first Congress, March 26, 1790, have been and have purported to be Acts "To establish an uniform Rule of Naturalization." The Act of June 29, 1906, purports to be an exercise of the power granted by the Constitution, and purports to be an exhaustive exercise of that power and is complete in itself.

As was said by the Supreme Court of the United States in construing an Act defining the jurisdiction of the Supreme Court, which jurisdiction is granted by the Constitution:

"The Constitution and the laws are to be construed together."

Durousseau v. United States, 6 Cranch 307.

And as was said by that court in the Wong Kim Ark case:

"The simple power of the national legislature is to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as it respects the individual."

United States v. Wong Kim Ark, ubi supra, p. 703.

It is also a well settled rule that an Act is to be construed as a whole and every part of it considered in order to find its scope and purpose.

This Act appears to be a complete Act. It provides in Section 3 for exclusive jurisdiction of naturalizing aliens, in Section 4,

"that an alien may be admitted to become a citizen of the United States in the folowing manner, *and not otherwise,*"

which is followed by five paragraphs prescribing the conditions of admission, among which, in paragraph two, is that the petition shall set forth

"every fact material to his naturalization and required to be proved upon the final hearing of his application."

and by Section 27 the form of this petition is given, containing the allegations which Congress believed were "material to his naturalization and required to be proved," and in this there is nothing with reference to color or race.

The intent of Congress to enact a uniform rule, and that it had enacted a uniform rule, for naturalization, covering the entire subject and even giving to

the rules and regulations the force of law, has been recognized.

In re Brefo, 217 Fed. 131.

(b) *The unrepealed sections of Title XXX provide for the naturalization of cases excepted from the uniform law.*

An examination of the sections of Title XXX of the Revised Laws of the United States, not expressly repealed by Section 26 of the Act of June 29, 1906, show nothing inconsistent with this view. Section 2166, which is a reenactment of the Act of July 17, 1862, provides for the admission of an exceptional class, namely, honorably discharged soldiers, without previous declaration. Section 2169 is limited in its application to the Title, of which it is a part. Section 2170, not expressly repealed, is *functus officio,* as its provisions are covered by the naturalization act of June 29, 1906, Sections 4 and 10. Section 2171 merely forbids the naturalization of alien enemies, except in certain instances, an instance the impossibility of which should have led to the repeal or modification of the section; and Section 2174 makes an exception in the case of alien seamen on merchant vessels and authorizes their admission after three years' service with good conduct, and declares them to be citizens so far as the merchant service is concerned after three years and entitled to protection after the declaration of intention.

Although the decision by Judge Ward in a case in the Circuit Court for the Southern District of New

York may be doubtful law, the language of his opinion in a case arising under Section 2166 is worthy of quotation:

"Although the general act of 1906 expressly repealed various provisions of existing law, it made no mention of Section 2166, which specially regulated the admission of honorably discharged soldiers. Congress must have intended that the admission of this class of aliens should continue to be regulated by Section 2166. I do not think the two acts irreconcilable, and both should be given effect as far as possible. Congress probably regarded honorably discharged soldiers as a special class, as to whom precautions generally necessary were not required. This would be natural as to applicants who had actually beeen in the service of the United States and as to whose good character the officers of the United States had certified."

In re Loftus, 165 Fed. 1002.

And this language has been adopted with approval by Judge Orr in the Western District of Pennsylvania.

In re Leichtag, 211 Fed. 681.

So far as the law of these cases is concerned, the view taken by the Circuit Court of Appeals of the Eighth Circuit would seem to be the correct one, although that applies to the allied case of soldiers, to which we will later refer, in holding that a right is granted to these excepted classes, but subject to all the restrictions for admission imposed by the uniform rule laid down in the statute of June 29, 1906, the court saying of that Act:

"The language there employed is comprehensive and emphatic. A 'uniform rule' is provided. 'An alien' may be admitted to citizenship in the manner prescribed, 'and not otherwise.'

"A wise public policy undoubtedly inspired the enactment of this law. Its intent, gathered from the unambiguous language employed, subjects all aliens to a public, drastic, and thorough examination touching their qualifications for citizenship before that priceless boon is conferred upon them. It is not our province to thwart this public policy by reading unwarranted or doubtful exceptions into the act."

United States v. Peterson, ubi supra, p. 291.

This view is emphasized by a number of decisions which hold that where there is an express direction of some unrepealed section of Title XXX, as, for instance, that one witness shall be sufficient, that command must be followed, and that the uniform rule does not apply to the specially excepted cases still provided in that Title.

In re Tancrel, 227 Fed. 329.
In re Loftus, ubi supra.
United States v. Lengyel, 220 Fed. 720.
In re Sterbuck, 224 Fed. 1012.

(c) *Section 2169 in terms is applicable to the excepted cases of Title XXX, and not to the uniform law provided by the Act of June 29, 1906.*

There is nothing in Section 2169 of the Revised Laws which either in terms or in spirit makes it applicable to the Act of June 29, 1906, which carries out the constitutional provision of establishing a uniform rule. Section 2169 in terms merely declares

the applicability of the provisions of Title XXX to certain classes of aliens. There is nowhere in the laws of the United States any declaration that a Japanese shall not be admitted to citizenship, nor is there any existing declaration from which this can be directly inferred. It has been inferred from the fact that Congress made the provisions of the Title in regard to naturalization apply specifically "to aliens being free white persons and to aliens of African nativity and to persons of African descent." There is nothing in this expression which is necessarily restrictive; it is only inferentially so. As a matter of fact, when the Revised Laws were passed in 1873 the section read:

"Sec. 2169. The provisions of this Title shall apply to aliens of African nativity and to persons of African descent."

which at best is an enlarging and not restrictive declaration that persons coming within these definiitons are entitled to naturalization, apparently thought necessary since they were formerly expressly excluded under Acts which provided specifically what aliens were eligible to naturalization. In the Act to correct errors the words ("being free white persons and to ailens") are inserted and the provision left as it stands at present. No argument can be drawn from the language used to show that the intention of Congress by this amendment was to *restrict* naturalization to free white persons. The argument which has been used to sustain that theory

is not drawn from the language, but from the previous history of legislation; but the previous history of all the legislation was that the declaration was found not in making the Act applicable to certain persons, but providing "an uniform rule of naturalization" that "*any alien being a free white person*" might be naturalized, and not making any provision for the naturalization of any alien who is not a free white person. That this was the view of Congress, and that it thought affirmative legislation was necessary to exclude the Chinese from citizenship, is shown by Congress passing the Act of May 6, 1882, which provides:

"Sec. 14. That hereafter no State court or court of the United States shall admit Chinese to citizenship; and *all laws in conflict with this act are hereby repealed.*"

To hold that Section 2169 is a restriction on the Act of June 29, 1906, which provides for a "uniform rule for the naturalization of aliens," requires not only the inference of a prohibition of the naturalization of other than free white persons and those of African nativity or descent from words which contain no such prohibition, but also to make a section which declares that "*the provisions of this Title shall apply*" to a restricted class of aliens, declare that the *provisions of the Act of June 29, 1906,* shall apply only to the same restricted class of aliens; not only converts that which is in terms an extension of the meaning of the Act into a restriction, but also in-

corporates into a general law, purporting to contain the entire uniform and general rule for naturalization, a provision which is in, and restricted in terms to, a title in another Act, which Act and which title have not been repealed. The more reasonable supposition is that Congress intended to retain Section 2169 as a limitation on the specially excepted classes provided for in the unrepealed sections in Title XXX, and that the general rule provided for in the Act of June 29, 1906, applied to all other aliens and was not to be restricted, excepting as provided in that Act. These conclusions, drawn from the general scope of the Act, are reinforced by the express language of the Act of June 29, 1906, which declares, in the language contained in the previous general Act,

> "Sec. 4. That an alien may be admitted to become a citizen of the United States in the following manner and *not otherwise.*"

and then proceeds to provide for *all* the conditions of admission and for a petition setting forth *"every fact material to his naturalization and required to be proved,"* and then gives a form for the petition which contains no fact showing that the applicant is a free white person or that he is of African nativity or African descent.

(d) *The history of Section 2169 and subsequent legislation and decision is inconsistent with the view that it is a restriction on the general terms of the Act of June 29, 1906.*

In another part of this brief we shall deal with the decisions construing Section 2169, and show, as we think, that very little aid can be drawn from these numerous decisions on the point in question, and that in fact, with conspicuous exceptions, they are no more creditable to the judiciary than is the law itself to Congress. The privilege of naturalization is one which has been said by the courts and by statesmen to be a privilege which America has sought to extend to immigrants from other nations in a friendly and a generous spirit; and yet America has had on her statute books since 1875, if the decisions which affirm that Section 2169 is restructive of th Act of June 29, 1906, are sound, a provision which has no meaning according to the ordinary acceptation of language and which is insusceptible of any satisfactory judicial construction. It has been held that the term is to be interpreted in the light of its first enactment in 1790, and again that it is to be construed, as the learned judge construed it in this case, in the light of the common and popular meaning at the time of its incorporation in the present form in Title XXX of the Revised Statutes, and neither line of decision has considered the marked change of language between the original Act, which limited naturalization to free white persons, and the language of Section 2169, which inserted those words in the provision which has been held to be sufficient to admit any alien of any color and race in 1874 and 1875.

In re Ah Chong, 2 Fed. 733.
United States v. Balsaro, 180 Fed. 694.
Dow v. United States, 226 Fed. 145.
In re Akhay Kumar Mozumdar, 237 Fed. 115.

If the naturalization of aliens was restricted to free white persons and those of African nativity and descent after the passage of the amendatory Act of 1875, then between 1874 and 1875 it would be restricted to those of African nativity or descent, which is incredible. The truth of the matter is that Congress at that time was not willing to place itself on record as to what aliens it would admit to citizenship and what it would not, although perhaps having the Chinese in mind, and the courts, with the rising tide of prejudice, have construed the language of the statute, not in the light that surrounded its enactment, but in the light of a prejudice which, as to the Japanese at least, did not exist at the time of the passage of the statute.

As we have already said, that Congress itself and those promoting the anti-Chinese propaganda distrusted the language is shown by the enactment of the law of May 6, 1882. We shall show also that the term "free white persons" has been construed in some cases to create a distinction of race, in others a distinction of color, in still others a distinction of locality, and here again with no agreement as to locality; and that this was the condition of the law when the Act of June 29, 1906, was passed. Is it reasonable to suppose that Congress at that time,

just after the Japanese-Russian war and the treaty of Portsmouth, at the very crest of the wave of Japanese and American friendship, would have enacted a law intending to affront one of the most sensitive, warlike and progressive nations on the face of the earth by declaring that its members were not fit for American citizenship, and is it not equally inconceivable that Congress in 1906 dodged the issue? It is only necessary to refer to the recent debates in Congress on the passage of the Immigration Bill, when it was again and again declared in Congress that there was no intention to discriminate against Japanese immigration, and the most sedulous efforts were made to preserve the bill from any appearance of offense to Japan.

(e) *The decided cases in the Federal courts, appearing to so hold, do not in fact hold Section 2169 applicable to the Act of June 29, 1906, and the cases cited to this point are not decisive of it.*

Let us briefly examine the cases in which it appears to be held that Section 2169 is a restriction on the Act of June 29, 1906, and here it is important to observe that all the cases treat the question as one of an implied repeal of that section, whereas the true question is whether the Act is not what it purports to be, the uniform and complete rule provided by the Constitution for the ordinary case of naturalization, and whether, if it be such a uniform and complete rule as the Constitution contemplated, Section 2169 would apply.

The question of the repeal of that section first arose in *Bessho v. United States,* 178 Fed. 245, where a Japanese petitioned, not under the Act of June 29, 1906, but under the Act of July 26, 1894. He was therefore one of the excepted classes. There can be no doubt that the Act of July 26, 1894, at the time of its passage was limited by Section 2169, and the only question which could arise was whether the section was impliedly repealed by the Act of June 29, 1906, and concerning this the court say:

"By this legislation a new and complete system of naturalization was adopted, all of the details of which together with the method of procedure, and the courts having jurisdiction of it, were set forth and designated, and all acts or parts of acts inconsistent with or repugnant to its provisions were repealed. In Section 26 of that act is found an express repeal of Sections 2165, 2167, 2168, and 2173 of the Revised Statutes (U. S. Comp. So. Supp. 1909, p. 488). These repealed sections are all included in Title 30 of said Revised Statutes, and demonstrate beyond doubt that the Congress carefully considered all of the provisions of that title, and that it intended that the unrepealed sections thereof should still remain in force. Among those unrepealed is Section 2169, which we thus find to be virtually re-enacted, and declared to be one of the rules under which future naturalizations are to be conducted. Another part of that title not repealed is Section 2166, which relates to aliens who have enlisted in the armies of the United States, and provides that, an alien, of the age of 21 years and upward, who has enlisted, or may enlist, in the armies of the United States, and has been, or may be thereafter, honorable discharged, shall be admitted to become a citizen of the United States, upon his petition, under certain conditions therein mentioned. This section is quite similar to

the Act of 1894, providing for the naturalization of aliens who have enlisted in the navy—the act under which the appellant applied—which last-mentioned act is also left in full force and effect by the Act of June 29, 1906.

"In the light of this legislation, showing as it does the plain intention of the law-making power, must not the courts, under the usual rules of construction, hold that Section 2169 of the Revised Statutes restricts the provisions of the enactments authorizing aliens who have enlisted in the navy, and in the army, to be admitted as citizens of the United States?"

Bessho v. United States, ubi supra.

United States v. Balsaro, ubi supra, comes a little nearer in its language, but in that case the order admitting a Parsee was affirmed, and what is said on the question of the implied repeal of Section 2169 is *obiter dictum.* It is assumed that the Act of June 29, 1906, is a part of Title XXX of the Revised Statutes of the United States. The requirement as to the allegations of the petition is not referred to and what is said about color in the declaration of intention overlooks the requirement that color should be shown "as a visible distinctive mark" to identify the petitioner for naturalization, and that the color is not required to be set forth in the petition as a material fact.

In re Alverto, 198 Fed. 688, merely cites *United States v. Balsaro* as authority to the point.

Summing up these cases, the Bessho case decides nothing in regard to the Act of June 29, 1906. It deals with the limitation on the excepted classes, and

the Act of July 26, 1894, which is said to be similar to Section 2166, which is not repealed, and, being a part of the title, would be controlled by Section 2169. What is said in the Balsaro case is dictum, and dictum of the hasty and ill-considered sort; and Thompson, District Judge, in the Alverto case does not even discuss the point and simply cites the dictum in the Balsaro case as decisive. It might be added of the Alverto case that the petitioner in that case relied on the Act of July 26, 1894, and sought to bring himself within the excepted classes. The petitioner also claimed under Section 30 of the Act of June 29, 1906.

It might be well to add that *In re Alverto* is inconsistent with the opinion of Attorney General Bonoparte, July 10, 1908, with the decision of Mr. Justice Gould, of the Supreme Court of the District of Columbia, December 13, 1915, *In re Monico Lopez,* from which no appeal was taken by the Department of Justice on the ground, in part, that in the Alverto case the applicant had not shown himself to be a resident at all, and also with the decision of the learned Judge below, March 25, 1916, on the petition of Marcus Solis. Judge Vaughan, of the same court, has since taken an opposite view in the case of Ocampo, decided December 30, 1916, and also District Judge Hand in the Southern District of New York *In re Lampitoe,* 232 Fed. 382.

(f) *The related cases in this court are inconsistent with Section 2169 being applicable to the Act of June 29, 1906.*

There are two cases in which this point came more or less incidentally before this court. In the Rodiek case the court had reason to construe the Act of June 29, 1906, and determined that it was a uniform Act and impliedly repealed that section of the Organic Act of the Territory of Hawaii, the Act of April 30, 1900, which provided that aliens who had resided for five years in Hawaii could be naturalized without the preliminary declaration of intention, and the court said:

"But we think that, in the present case, the intention of Congress to repeal the special law is manifest. The title of the act is indicative of the purpose to establish a uniform rule of naturalization throughout the United States. The terms of Section 4 explicitly provide that naturalization cannot be had otherwise than by first making a declaration of intention two years prior to admission, and the repealing section of the act expressly repeals all acts or parts of acts inconsistent with or repugnant to its provision. The special act dispensing with the declaration of intention in the Territory of Hawaii was clearly inconsistent with Section 4 of the Act of June 29, 1906. There is no reason to presume that in enacting the later statute Congress intended to make any special provision for the naturalization of residents of Hawaii. They were not a distinct class of residents of the United States. There was no reason for bestownig special privileges upon them, as in the case of discharged soldiers and seamen, and they were under no disability to make declarations of their intention to become citizens. We think the intention was to adopt a new scheme of procedure in naturalization, and to make it uniform throughout the United States, and to provide for no exception as to any portion or section of the geographical territory subject to the authority given to

In other words, that fraud or illegality must be shown. This court speaks of the Act of June 29, 1906, in contrast to the Revised Statutes, as "the new law."

United States v. Rockteschell, 208 Fed. 530.

(g) *A comparison of the legislation in reference to immigration, including the recent Act, shows that the policy of Congress is to exclude undesirable citizens and the Chinese, and that Congress has industriously refrained from any action placing or tending to place the Japanese in the same class with the Chinese.*

Immigration precedes naturalization in natural and logical order. The same reasons which would tend to restrict one operate on the other.

Up to the time of the adoption of the Revised Statutes, by treaties and statutes, the immigration of aliens had been encouraged, with one exception, the alien Act of June 25, 1798, which was largely instrumental in sweeping the Federals from office and bringing in the Republican administration of Jefferson. That Act "has ever since been the subject of universal condemnation" (Mr. Justice Field in *Fong Yue Ting v. United States,* ubi supra).

Since the passage of the Revised Laws, various Acts have limited immigration, finally culminating in the Act of February 5, 1917. The earliest, that of March 3, 1875 (18 Stat. L., p. 477), is a limitation on the importation of women for immoral purposes, the supplying of coolie labor, and the entrance of

alien persons under sentence for felonious crimes other than political.

By the Act of August 3, 1882 (22 Stat. L., p. 214), convicts, lunatics, idiots or persons unable to take care of themselves were forbidden admission.

By the Act of February 26, 1885 (23 Stat. L., p. 332), amended February 23, 1887 (24 Stat. L., p. 414), Congress reversed the policy of the United States, initiated by President Lincoln during the war, and prohibited the introduction of contract labor.

By the Act of March 3, 1891 (26 Stat. L., p. 1084), there were added to the prohibited classes, paupers, persons suffering from a loathsome or dangerous contagious disease, and persons who had been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude, polygamists, and also assisted immigrants.

By the Act of March 3, 1903 (32 Stat. L., p. 1213), there were added epileptics, persons who had been insane within five years or who had had two or more attacks, professional beggars, anarchists, prostitutes, procurers, and those previously deported.

A comparison with the requirements for naturalization made in the Act of June 29, 1906, shows that Congress had in mind to exclude from naturalization the same classes who were denied admission under the immigration law, with the exception of those suffering from physical infirmities, these requirements as against physical infirmities acquired

in this country being not applicable in case of naturalization.

An examination of the laws in regard to race exclusion shows that numerous Chinese exclusion Acts have been passed: May 6, 1882 (22 Stat. L., p. 58), July 5, 1884 (23 Stat. L., p. 115), September 13, 1888 (25 Stat. L., p. 476), May 5, 1892 (27 Stat. L., p. 25), November 3, 1893 (28 Stat. L., p. 7), June 6, 1900 (31 Stat. L., p. 588), March 3, 1901 (31 Stat. L., p. 1093), April 29, 1902 (32 Stat. L., p. 176), and April 27, 1904 (33 Stat. L., p. 394). The two latter Acts extend exclusion to the island territory under the jurisdiction of the United States, but do not forbid the passage from one island to another, and provide for Chinese laborers, other than citizens, obtaining a certificate elsewhere than in Hawaii. In none of these laws is there any reference to any other nationality than Chinese.

In Hawaii, by the joint resolution of July 7, 1898 (30 Stat. L., p. 751), further immigration of Chinese into the Hawaiian Islands was prohibited, and no Chinese was allowed to enter the United States from the Hawaiian Islands; and by the Organic Act of April 30, 1900 (31 Stat. L., p. 141), the Chinese were required to procure certificates under the Act of May 5, 1892.

The Act of March 3, 1891, committed to the Commissioner General the enforcement of the Chinese exclusion Act, while the Act of March 3, 1893, provided that it should not apply to Chinese persons,

and the 36th section of the Act of March 3, 1903, contains this provision:

"Provided, That this Act shall not be construed to repeal, alter, or amend existing laws relating to the immigration, or exclusion of Chinese persons or persons of Chinese descent."

This was inserted in order to preserve those laws from repeal (24 Op. Atty.-Gen. 706).

"The existence of the earlier laws only indicates the special solicitude of the government to limit the entrance of Chinese."

United States v. Wong You, 223 U. S. 67.

In re Dow, 213 Fed. 355.

There is no line in any statute before or since 1875 which indicates any intention on the part of Congress to put the Japanese into the class with immoral, insane and other undesirable immigrants, or to class the Japanese with the Chinese. We have traced the course of legislation along these two parallel lines and endeavored to show that the legislative mind ran in each case in the same course, and that there is no trace of any intention to exclude the Japanese from admission or from naturalization.

The Supreme Court of the United States, in reviewing the history of the immigration Acts, has held that the purpose of applying these prohibitions against the admission of aliens is to exclude classes (with the possible exception of contract laborers)

who are undesirable as members of the community, even if previously domiciled in the United States.

Lapina v. Williams, 232 U. S. 78.

(h) *This view is enforced by the existing treaty with Japan.*

By the treaty with Japan of March 21, 1895 (29 Stat. L., p. 849),

"the citizens or subjects of each of the two high contracting parties shall have full liberty to enter, travel, or reside in any part of the territories of the other contracting party, and shall enjoy full and perfect protection for their persons and property."

and this was held by the Supreme Court of the United States not to apply to an alien who was a pauper or likely to become a public charge, holding

"That Congress may exclude aliens of a particular race from the United States; prescribe the terms and conditions upon which certain classes of aliens may come to this country";

the appellant coming under the latter class.

Yamataya v. Fisher, 189 U. S. 86.

This treaty is still in force, but in April, 1911, a new treaty, dealing solely with commerce and navigation, was negotiated. *Each treaty contains the favored nation clause.*

Nothing could more clearly show the distinction made between Japanese and Chinese as to naturalization than that the *only limitation* on the rights of Japanese aliens in this country under the treaty

of March 21, 1895, is the stipulation that the rights given

"do not in any way affect the laws, ordinances and regulations with regard to trade, the immigration of laborers, police and public security which are in force or which may hereafter be enacted in either of the two countries."

Yamataya v. Fisher, 189 U. S. 86.

while the Chinese treaty of December 8, 1894, provided that Chinese

"either permanently or temporarily residing in the United States, shall have, for the protection of their persons and property, all rights that are given by the laws of the United States to citizens of the most favored nation, *excepting the right to become naturalized citizens.*"

This has been held in an opinion by Judge Morrow, then District Judge, to make void, in connection with the Act of Congress of May 6, 1882, forbidding the naturalization of Chinese, a certificate of naturalization to a Chinaman.

In re Gee Hop, 71 Fed. 274.

(i) *The immigration Act of February 5, 1917, and the circumstances of its passage in Congress show the clear intention of that body to make no declaration that Japanese are excluded from naturalization.*

The immigration Act of February 5, 1917, and its discussion in Congress show that Congress has no intention of placing the Japanese in a class with the

Chinese. That bill expressly excepts Japan from its provisions by a territorial limitation, and this was done in deference to the Japanese Government. (See correspondence between Senator Phelan and Secretary of Labor Wilson, Congressional Record, December 13, 1916, p. 266.) That bill, as it came from the House, while making some small changes in excluded persons, particularly those afflicted with tuberculosis, was chiefly marked by two additional grounds of exclusion: one, the provision for which three presidents of the United States had vetoed similar Acts, the requirement that aliens over sixteen years of age, physically capable of reading, who cannot read the English language or some other language or dialect, should be excluded, which finally became the law over the veto of President Wilson; the other, the inclusion in the excluded classes of:

"Hindus and persons who can not become eligible, under existing law, to become citizens of the United States by naturalization, unless otherwise provided for by existing agreements as to passports, or by existing treaties, conventions, or agreements or by treaties, conventions, or agreements that may hereafter be entered into." (Congressional Record, p. 164.)

To this clause the Japanese Government objected, and the State Department requested the bill to be amended (Congressional Record, Dec. 11, 1916, p. 165; and p. 235, Senator Lodge), and the bill was amended as follows:

" * * * unless otherwise provided for by existing treaties, persons who are natives of islands not

possessed by the United States adjacent to the Continent of Asia, situate south of the twentieth parallel latitude north, west of the one hundred and sixtieth meridian of longitude east from Greenwich, and north of the tenth parallel of latitude south, or who are natives of any country, province, or dependency situate on the Continent of Asia west of the one hundred and tenth meridian of longitude east from Greenwich and east of the fiftieth meridian of longitude east from Greenwich and south of the fiftieth parallel of latitude north, except that portion of said territory situate between the fiftieth and the sixty-fourth meridians of longitude east from Greenwich and the twenty-fourth and thirty-eighth parallels of latitude north, and no alien now in any way excluded from, or prevented from entering, the United States shall be admitted to the United States."

Numerous amendments were offered to this clause. The southern senators endeavored to exclude immigration of Negroes, particularly from the West Indies; the members from the Pacific coast to exclude the Orientals. All amendments were voted down, the west not voting with the south on the Negro, and the south not voting with the west on the Asiatic.

There are frequent tributes in the debate to the Japanese nation; among others that Japan has control of the Pacific Ocean, is a great naval and military power. (Senator Gallinger, p. 285.)

"As a matter of fact, I believe that Japan is one of the most efficient as well as one of the most powerful of nations. I recognize her great intelligence, I recognize her great efficiency in whatever walk of industrial life they seek to enter." (Senator Chamberlain, p. 226.)

"I have never claimed, neither do the people of the Pacific coast claim, that the Japanese are an inferior race." (Senator Works, p. 228.)

"The Japanese feel that they are equal; in fact, they feel that they are our superiors, and in many respects they are. They are able, fit, thrifty, and shrewd." (Senator Lane, p. 231.)

"There are some 14,000,000 negroes in the South. They are spreading themselves all over the United States. Everybody admits that they are an inferior race to the Japanese.

" * * * The Senate has today and yesterday voted down half a dozen amendments to this bill to exclude negroes from immigration into the United States. Neither the Independent Senator from the State of California nor the Democratic Senator will dare to say that the Japanese are inferior to negroes, and yet we got no help. We asked for bread, and you gave us a stone. You are not willing to vote to exclude negro immigration from the West Indies."

"You stand around and smile and risk international complications with Japan on a race issue about the Japanese, who are as highly civilized as you are.

" * * *

"The Japanese are not a race of barbarians; they are not a race of veneered men; they are a race of people who have proven their ability to stand in the front ranks of civilization." (Senator Williams, pp. 388, 389.)

In the course of the debate, there are frequent statements that Japanese are ineligible to citizenship, but (pp. 234, 235) *Congress evidently did not know whether the Japanese were excluded or not.* Senator Lodge (p. 234) said:

"The only change from that bill which was vetoed (by President Wilson) was the insertion of the word 'Hindus'—'Hindus and persons who can not become eligible under existing law.' The purpose of that was to exclude Asiatic immigration, Mongols having been held by the courts to be not eligible to naturalization."

but he goes on to say that this form of words was extremely offensive to Japan. Senator Norris pushed Senator Lodge with the question why Japan objected to the language; they were either included or not included, either eligible or not ligible; and Senator Phelan asked, apropos of an amendment (not appearing in the enacted law) in which "white persons" were added to the various status and occupations not excluded, what was meant by "white persons," saying that the Hindus claim, in naturalization proceedings, to be white persons of the Aryan race, to which Senator Lodge assented, saying:

"Well, by the use of the expression 'white persons' you have no protection whatever under the naturalization law" (p. 234);
"that is not defined" (p. 334).

"MR. PHELAN. The Japanese claim that they are white persons; the Hindus claim that they are white persons. It is a very dangerous proposition."

"MR. LODGE. Yes; they claim it, but it has not been so held. I think it is a danger involved in the naturalization law, which is the foundation of the whole thing" (p. 234).

"MR. LODGE. Nobody has ever claimed that Mongolians were of the white race."

"MR. PHELAN. The Japanese dispute that they are Mongolians."

"MR. LODGE. They may do so, but it has never been held by our courts that they were white" (p. 235).

"MR. NELSON. Would it not be more accurate, instead of saying 'white persons,' to say 'persons of the white race'? Would not that be more exact and more comprehensive, and is not the expression 'white persons' ambiguous?"

"MR. LODGE. I think the expression 'white persons' is more explicit, because when that expression is used it becomes a pure question of color, and you lose the ethnic distinction entirely. I am not sure that the employment of the term 'white persons' might not get us into some difficulties elsewhere, but 'white race' is not a scientific definition at all. The difficulty lies in trying to accomplish what is sought to be accomplished without using names. We are trying to avoid that" (p. 235).

In the Conference Committee the phrase "white persons" was deleted. From this it appears that the Japanese Government and the State Department and Congress deleted the provision in reference to persons who are not eligible to naturalization lest it should be an implied recognition that the Japanese might not be eligible, and that Congress fully understood that under existing law it was the Mongolians who were intended to be excluded, and that the Japanese claim not to be Mongolians, but white persons within the existing law.

In this connection it is worth noting that among the Acts which are not repealed, altered or amended by this Act are all Acts relating to the immigration or exclusion of Chinese, among which Acts is the Act of May 6, 1882, forbidding naturalization of Chinese.

It thus affirmatively appears that Congress refused, at the request of the Japanese Government, to put into law an implied recognition that the Japanese are excluded from citizenship.

III.

SECTION 2169, IF APPLICABLE TO THE ACT OF JUNE 29, 1906, MUST BE CONSTRUED AS MEANT IN THE ACT OF MARCH 26, 1790, AND, SO CONSTRUED, "FREE WHITE PERSONS" MEANS ONE NOT BLACK, NOT A NEGRO, WHICH DOES NOT EXCLUDE JAPANESE.

(a) *Section 2169, if considered as a reenactment of the earlier law, is to be construed in the light of, and with the meaning of the original Act of March 26, 1790.*

" * * * upon a revision of statutes, a different interpretation is not to be given to them without some substantial change of phraseology—some change other than what may have been necessary to abbreviate the form of the law. Sedg. Stat. Const., 365."

McDonald v. Hovey, 110 U. S. 619.
In the matter of Kang-Gi-Shun-Ca., 109 U. S. 556.
Crenshaw v. United States, 134 U. S. 99.

"The reenacted sections are to be given the same meaning they had in the original statute, unless a contrary intention is plainly manifested."

United States v. Le Bris, 121 U. S. 278.

There must be something clearly showing an intention to change the law.

United States v. Ryder, 110 U. S. 729.

The construction is with reference to the original Act.

"This rule has been repeatedly applied in the construction of the Revised Statutes."
Hamilton v. Rathbone, 175 U. S. 414.

"The meaning of free white persons is to be such as would naturally have been given to it when used in the first naturalization Act of 1790."
Ex parte Shahid, 205 Fed. 812.

(b) *So construed, the words "free white persons" in the Act of March 26, 1790, mean free whites as distinct from blacks, whether slave or free.*

At the time the original law was passed, which provided for the admission of "aliens being free white persons," there can be no question but white was used in counter distinction from black, and "free white persons" included all who were not black. The latter were chiefly slaves, regarded as an inferior race, and the Constitution, Article I, Section 9, provided that

"The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight."

which provision was universally understood to be aimed at the abolition of the slave trade after that date It was certainly not used in a scientific or technical sense.

Blumenbach's race classification, which has been cited by many as a basis for construing this Act,

was published in Germany during the American Revolution in 1781. It was first translated into English in London in 1807 by Eliotson.

In re Dow, 213 Fed. 355, 365.

Dow v. United States, 226 Fed. 145.

It was only a few years before this, 1783, that Harvard had permitted those not preparing for the ministry to take French instead of Hebrew, and Charles Follen became the first instructor in German in any college at Harvard in 1825, and it is well known that it was not until much later than 1790 that there was any Germanic influence in American education. In fact, it was an almost unheard of thing that Bancroft, after his graduation in 1817, should go to Germany for further study. No college or university taught anthropology until after the middle of the nineteenth century. The first systematic instruction was at Harvard in 1888 and at Clark University in 1889. The various instrumentalities for anthropological research have grown up since 1875. (Americana Vol. 1, Anthropology.)

None of the Senators or Congressmen had any education which brought them into contact with Blumenbach's classification when this naturalization law was passed in 1790. In the course of a debate on the law in 1790 Madison, who was then in Congress, said:

"They would induce the worthy of mankind to come, the object being to increase the wealth and strength of this country. Those who weaken it are not wanted."

In the same debate, Page of Virginia held that the European policy does not apply here, and that a more liberal system was permissible. It was inconsistent with the claim of Asylum to make hard terms. These would exclude the good and not the bad. He would welcome all kinds of immigrants; all would be good citizens. Lawrence of New York declared that they were seeking to encourage immigration. All comers, rich or poor, would add to the wealth and strength of the country. Those speaking on the other side urged the apprehension from introducing paupers or criminals, or those lacking in character, in knowledge of or attachment to free institutions, for instance, Roger Sherman, who thought the intention of the constitutional provision was to prevent States from forcing undesirable persons on other States, and that Congress would not compel the reception of immigrants likely to be chargeable to a State.

President Jefferson, in his first message to Congress, December, 1801, said, in recommending the repeal of the alien Act of 1798, and the revision of the laws on the subject of naturalization:

"Shall we refuse to the unhappy fugitives from distress that hospitality which the savage of the wilderness extended to our fathers arriving in this land? Shall oppressed humanity find no asylum on this globe?"

Judge Lowell, in the most exhaustive discussion that has been had upon the meaning of this section, after showing that race "is not an easy working test

of 'white' color as required by Section 2169," continues:

"Section 2169, however, makes no mention of race or of racial discrimination. 'White persons' are to be naturalized and (except Africans) no others. If we pass from racial speculation and remote history to the usage of the colonies and of the United States in statutes and in official documents, the interpretation of the word 'white' will be found less difficult. In this interpretation the statutes for taking the census and the actual classification employed therein are instructive. A census, dealing with all inhabitants (except untaxed Indians in some cases), cannot discriminate against any inhabitant by omission. The Massachusetts census of 1764 classified the inhabitants of the province as whites, negroes and mulattos, Indians, and 'French neutrals.' The Rhode Island census of 1748 as whites, negroes, and Indians; that of 1774 as whites, blacks, and Indians. The Connecticut census of 1756 classified the persons enumerated as whites, negroes, and Indians; that of 1774 as whites and blacks. The blacks were classified as negroes and Indians. The New York census of 1698 classified the persons enumerated as men, women, children, and negroes; that of 1723 as whites, negroes, and other slaves; those of 1731, 1737, 1746, 1749, 1756 and 1771 as white and black; that of 1786 as whites, slaves, and 'Indians who pay taxes.' The New Jersey census of 1726 classified the persons enumerated as whites and negroes; that of 1737-38 as whites, negroes, and other slaves. The Maryland census of 1755 classified the persons enumerated as whites and blacks. A Century of Population Growth in the United States, published by the Department of Commerce and Labor in 1909, chapter on White and Negro Population, and Enumerations of Population in North America prior to 1790. 'The population of the earliest English settlements in America,' so the chapter opens, 'was composed of two elements, white and negro. These two elements, though sub-

ject to entirely different conditions, continue to compose the population of the republic." Page 80. Here, again, 'white' is made to include all persons not otherwise specified.

"The census act of 1790 (Act March 1, 1790, c. 2, 1 Stat. 101) provided for a census of all the inhabitants of the United States, except Indians not taxed. These inhabitants were to be classified by 'color,' and the schedule provided by the statute made a classification as free whites, other free persons, and slaves. It is evident from the government publication just quoted that the phrase 'other free persons' was construed to mean 'free negroes,' and this was substantially the classification made in the censuses taken in the first half of the nineteenth century. Act May 23, 1850, c. 11, 9 Stat. 428, 433, for the taking of the seventh and subsequent censuses, provided in the statutory schedule for a classification of free inhabitants by color as 'white, black, or mulatto.' In the census of 1860 the classification was 'white, free colored, and slaves,' and the class 'free colored' was subdivided between blacks and mulattoes. Rev. St., Sect. 2206, provided for census schedules classifying all inhabitants of the United States by color as 'white, black, or mulatto,' although there appears to have been special provision for the enumeration of Indians (Act March 1, 1889, c. 219, Sect. 9, 25 Stat. 763), and the enumeration was made accordingly. 'For the censuses from 1790 to 1850, inclusive, the population was classified as white, free negro, and slave only, while for the censuses from 1860 to 1890, inclusive, the population included, besides the white and negro elements, the few Chinese, Japanese, and civilized Indians reported at each of these censuses.' Eleventh Census, part I, p. XCIV. In fact, the classification was not uniform in all parts of the country. Census Act March 3, 1899, c. 419, Sect. 7, 30 Stat. 1014 (U. S. Comp. St. 1901, p. 1339), provided for a classification of inhabitants by 'color,' and appears to have left the preparation of schedules to the director of the census.

The classification employed, in some instances at least, was as whites, negroes, Indians, Chinese, and Japanese. In other instances 'colored' as opposed to 'white' was used to include negroes, Chinese, Japanese, and Indians. Throughout the Chapter cited in the above-mentioned Bulletin, it is assumed that all persons not classified as white, in the first eight federal censuses at any rate, were negroes or Indians.

"This use of the word 'white,' which has been illustrated from the censuses, both colonial and federal, is further exemplified in modern statutes requiring separate accommodation in travel. A statute of Arkansas required separate accommodation for the 'white and African races,' and provides that all persons not visibly African 'shall be deemed to belong to the white race.' Acts 1891, p. 17, c. 17, Sect. 4. See, also, Laws Fla. 1909, p. 39, c. 5893; Acts Va. 1902-1904 (Extra Sess.), p. 987, c. 609, subc. 4 (Code 1904, Sect. 1294d); Civ. Code S. C. 1902, Sect. 2158. Concerning the use of the word 'white' in treating of schools, see Civ. Code S. C. 1902, Sect. 1231; Ky. St. 1909 (Russell's), Sects. 5607, 5608, 5642, 5765 (Ky. St. 1909, Sects. 4523, 4524, 4428, 4487). The recent Constitution of Oklahoma (Article 23, Sect. 11) reads as follows:

" 'Whenever in this Constitution and laws of this state the words "colored" or "colored person," "negro," or "negro race" are used, the same shall be construed to mean to apply to all persons of African descent. The term "white race" shall include all other persons.'

"References like those made above could be multiplied indefinitely.

"From all these illustrations, which have been taken almost at random, it appears that the word 'white' has been used in colonial practice, in the federal statutes, and in the publications of the government to designate persons not otherwise classified. The census of 1900 makes this clear by its express mention of Africans, Indians, Chinese, and Japan-

ese, leaving whites as a catch-all word to include everybody else. A similar use appears 130 years earlier from the provincial census of Massachusetts taken in 1768, where 'French neutrals' are not reckoned as white persons, notwithstanding their white complexion. Negroes have never been reckoned as whites; Indians but seldom. At one time Chinese and Japanese were deemed to be white, but are not usually so reckoned today. In passing the act of 1790 Congress did not concern itself particularly with Armenians, Turks, Hindoos, or Chinese. Very few of them were in the country, or were coming to it, yet the census taken in that year shows that everybody but a negro or an Indian was classified as a white person. This was the practice of the federal courts. While an exhaustive search of the voluminous records of this court, sitting as a court of naturalization, has been impossible, yet some early instances have been found where not only western Asiatics, but even Chinese, were admitted to naturalization. After the majority of Americans had come to believe that great differences separated the Chinese, and later the Japanese, from other immigrants, these persons were no longer classified as white; but while the scope of its inclusion has thus been somewhat reduced, 'white' is still the catch-all word which includes all persons not otherwise classified."

In Re Halladjian, 174 Fed. 834, 841, 842, 843, 844.

(c) *"White person," as construed by the Supreme Court of the United States and by the State courts, means a person without negro blood.*

This was so held by the Supreme Court of the United States in construing Section 2154 of the Revised Statutes, and it was held

"that Congress meant just what the language used conveys to the popular mind."

namely, a person not a negro.

United States v. Perryman, 100 U. S. 235.

We shall give, in connection with citations from the dictionaries, a reference to the numerous States which have used the expression "white person" to distinguish a person who has no negro, or only a part negro, blood in his veins since the abolition of slavery. The earlier statutes in the States are reviewed by Chief Justice Taney in *Dred Scott v. Sandford,* and he shows, by an examination of these, the provision in the Articles of Confederation using the term "free inhabitants," to describe those who were "entitled to all the privileges and immunities of free citizens, in the several States," and the naturalization Act of March 26, 1790, that the expression "free white person" was used to exclude members of the inferior and degraded negro race, whether free or slaves. In discussing the first Militia Law, passed in 1792, he says:

"The language of this law is equally plain and significant with the one just mentioned. It directs that every 'free able-bodied white male citizen' shall be enrolled in the militia. The word 'white' is evidently used to exclude the African race, and the word 'citizen' to exclude unnaturalized foreigners, the latter forming no part of the sovereignty; owing it no allegiance, and therefore under no obligation to defend it. The African race, however, born in the

country, did owe allegiance to the government, whether they were slave or free; but it is repudiated, and rejected from the duties and obligations of citizenship in marked language."

Dred Scott v. Sandford, 19 How. 393, 420.

"White," as used in the legislation of the slave period, meant persons without a mixture of colored blood, whatever the complexion might be.

Du Val v. Johnson, 39 Ark. 182, 192.

(d) *The primary definition of these words, as given by the great dictionaries, is one who is white, not black, nor a negro.*

White is defined in the Standard Dictionary as

"1. * * * opposed to black. * * *

"2. Having a light complexion. (1) Of the color of the Eurafrican or Caucasian race: opposed especially to negro, but often to the yellow, brown, or red races of men."

The Century defines white as

"1. * * * The opposite of black or dark.

" * * *

"6. Square; honorable; reliable; as, a white man. (Slang, U. S.)"

Webster defines it as

"1. The opposite of black or dark * * *"

and defines a white person as

"a person of the Caucasian race (6 Fed. 256). In the times of slavery in the United States, *white person* is construed in effect as a person without admixture of colored blood."

"White person" is defined in the new Standard Dictionary as

"1. Any person of the Eurafrican race.

"2. (U. S.) Any person without admixture of negro or Indian blood. Since 1865 various legal constructions of this term have been made in different States, as in Arkansas, where a white person is one having no negro blood, or in Ohio, where one is a white person who has just less than half negro blood in his veins."

"In various statutes and decisions in different States since 1865 *white person* is construed in effect as a person not having any negro blood (Arkansas and Oklahoma). A white person is one having less than one-eighth of negro blood (Alabama, Florida, Georgia, Indiana, Kentucky, Maryland, Minnesota, Montana, Tennessee, Texas, Maine, North Carolina and South Carolina). A white person is one having less than one-fourth of negro blood (Michigan, Nebraska, Oregon and Virginia). A white person is one having less than one-half of negro blood (Ohio)."

Webster's New International Dictionary.

(e) *The insertion by Congress of the word "free" in Section 2169 in 1875, a word which had a definite meaning in 1790, but has no meaning if construed as a new enactment in 1875, shows the intention to re-enact the old section with the old meaning.*

In 1875, as we have shown, "free" was inserted in the phrase "free white persons" to distinguish the class of aliens who could be naturalized from all negroes, whether slave or free. Again, at that time slavery existed in this country, and Congress had no power to forbid the slave trade, whether white or black. In 1875 there had been a complete change,

not only in this country, but in the world. Slavery had been abolished in 1865 by the thirteenth amendment, and, as Dr. Francis Wharton used to say, before the Civil War freedom was sectional and slavery universal, whereas, after the war, freedom is universal and slavery sectional. If the word "free" refers to the condition of aliens in the United States, all aliens are free; if it refers to their condition in the country to which they owe allegiance, being domiciled in the United States, the land of the free, they have become free by the mere fact of coming into a free country.

IV.

IF SECTION 2169 IS TO BE CONSTRUED AS A NEW ENACTMENT, AND NOT IN THE LIGHT OF ITS ORIGINAL MEANING, THEN IT IS NOT A LIMITATION, BUT SIMPLY A DECLARATION THAT THE ACT APPLIES TO THE CLASSES NAMED.

No judge and no court has ever analyzed this section, excepting Judge Lowell, and he says:

> "To make the additional express inclusion of whites by the amendment of 1875 operate to exclude all other persons from naturalization is an awkward construction, but seems inevitable. By Act May 6, 1882, c. 126, Sect. 14, 22 Stat. 61, the courts were forbidden to naturalize Chinese."
>
> *In re Halladjian,* 174 Fed. 834.

As a matter of fact, the opinions, from that of Judge Sawyer down, are based on the debates in

Congress and not the language of the provision. As a matter of fact, the debate in 1870 was confined to the Chinese, and at that time the words as used in existing law were restrictive. The remarks of Mr. Poland in 1875 show Congress intended to give the old meaning to the clause.

Even the language of a member of the committee cannot be resorted to for the purpose of construing a statute contrary to its plain terms.

> *Pennsylvania R. Co. v. International Coal Min. Co.,* 230 U. S. 184.

And beyond the reports of the committee, the Federal Supreme Court will not go, which court says:

"The unreliability of such debates as a source from which to discover the meaning of the language employed in an act of Congress has been frequently pointed out."

> *Lapina v. Williams,* ubi supra.

The original language was a part of what became Section 2165, which provided for the naturalization "of an alien, being a free white person." After the enfranchisement of the colored race, by the special Act of July 14, 1870, naturalization was permitted to "aliens of African nativity and * * * persons of African descent." The latter Act is clearly an extension and not a restriction of the right of naturalization. When the Revised Statutes were passed, the words "being a free white person" were left out of Section 2165, and the Act of July 14, 1870, became Section 2169 as follows:

"Sec. 2169. The provisions of this Title shall apply to aliens of African nativity and to persons of African descent."

This is perhaps needless, as Judge Lowell says. At this time any alien could be naturalized, and no court has ever suggested that this phrase was a limitation on Section 2165 and limited naturalization to those of African nativity and descent. The courts continued to naturalize as before. The only change made by the Act to correct errors was to insert in this clause, not then considered a limitation on Section 2165, the words "being free white persons, and to aliens," so that it reads in the present form:

"Sec. 2169. The provisions of this Title shall apply to aliens (being free white persons, and to aliens) of African nativity and to persons of African descent."

By what stretch of reasoning can it be inferred, by the use of this language, that Congress intended to change a section, not restrictive, into a restrictive section?

V.

GIVING THE WORDS "FREE WHITE PERSONS" THEIR COMMON AND POPULAR ACCEPTATION IN 1875, NO DEFINITE RULE CAN BE LAID DOWN, BASED ON COLOR, RACE OR LOCALITY OF ORIGIN, AND THERE IS NOTHING IN THE LAWS OF THE UNITED STATES, ITS TREATIES, IN THE HISTORY OF THE

TIME, OR THE PROCEEDINGS OF CONGRESS, TO SHOW THAT JAPANESE WERE INTENDED TO BE EXCLUDED.

(a) *Up to 1875, there had been no Japanese immigration, no suggestion of their exclusion, and America had recently opened Japan to the western civilization, which Japan was gladly welcoming.*

The immigration reports show that up to 1875 practically no Japanese immigrants had entered America. In the decade 1861-70, two hundred eighteen arrived, and in the next decade the number fell off. Exclusive of students, there were probably not fifty Japanese in the whole country. The Asiatic immigration was Chinese, largely imported to build the Pacific railroads, an immigration of an entirely different character from the present Japanese immigration, an immigration of single men who did not come to establish homes; the women of the race being imported as slaves for immoral purposes. It was a race which came chiefly as contract laborers, expecting to return; and these immigrants are termed indifferently in the debates and in the decisions Mongolian and Chinese. Where the former term is used Chinese is meant.

As Judge Morrow says, using the term with more accuracy:

"That congress has never contemplated or intended to confer the right of naturalization upon Mongolians, *or natives of China,* is palpable by a mere reference to the laws upon the subject of naturaliza-

tion. Section 2169 of the Revised Statutes, under the title 'Naturalization,' reads:

"'The provisions of this title shall apply to aliens (being free white persons, and to aliens) of African nativity, and to persons of African descent.'

"Mongolians, *or persons belonging to the Chinese race,* are not included in this act. This was the view held by Judge Sawyer, sitting on the circuit bench for this circuit (Ninth), *In re Ah Yup,* 5 Sawy. 155, Fed. Cas. No. 104, where the subject was very learnedly and elaborately discussed and considered. He says, in summing up his conclusions:

"'Thus, whatever latitudinarian construction might otherwise have been given to the term "white person," it is entirely clear that congress intended, by this legislation, to exclude Mongolians from the right of naturalization. I am therefore of the opinion that a native of China, of the Mongolian race, is not a white person, within the meaning of the act of Congress.'"

In re Gee Hop, ubi supra.

(b) *Judicial construction of the phrase up to 1875 does not sustain such an exclusion.*

We have already cited the Dred Scott case and a case from Arkansas upon this point. Apart from this, there is little of judicial construction to be found. The Act was before the courts in New York and construed in an ably argued case, in which the Vice-Chancellor, referring to President Madison's declaration in the debates in the Federal Convention in 1787 to the fact that America was indebted to emigration for its settlement and prosperity, showed that the judicial policy was to encourage emigration,

and "to bestow the right of citizenship freely, and with a liberality unknown to the old world."

Lynch v. Clarke, 1 Sandf. 583, 649, 661.

Amongst the Acts discussed are two in which it appears that Virginia amended a statute of May, 1779, Chap. 55, which limited citizenship to *free white persons,* in 1792 to include *"all free persons"* (pp. 666, 667).

A decision by a divided California court, that the words in the 14th section of the Act of April 16, 1850, providing that "No Black or Mulatto person, or Indian, shall be allowed to give evidence in favor of, or against a white man," included a Chinaman, holding that the term "Indian, from the time of Columbus to the present time, had been used to designate "the whole of the Mongolian race,"

"that 'White' and 'Negro' are generic terms, and refer to two of the great types of mankind."

"and that, even admitting the Indian of this continent is not of the Mongolian type, that the words 'black person,' in the 14th section, must be taken as contradistinguished from white, and necessarily excludes all races other than the Caucasian."

People v. Hall, 4 Cal. 399, 404.

This decision does not seem to have been treated with much respect as a matter of reasoning; the legislature speedily amended the law, and the same court held that while *People v. Hall* must be followed,

"we cannot presume that all persons having tawny skins and dark complexions are within the principle of that decision."

and allowed a Turk to testify on the ground that the Caucasian type predominated and constituted the controlling element.

People v. Elyca, 14 Cal. 145.

All that Chancellor Kent says is that he "presumes" that the phrase excludes the inhabitants of Africa and their descendants, and then he suggests that it *may* become a question to what *extent* persons of mixed blood are excluded, and what shades and degrees of mixture of color disqualify, and

"Perhaps there *might* be difficulties also as to the copper-coloured natives of America, or the yellow or tawny races of the Asiatics, and it may well be *doubted* whether any of them are 'white persons' within the purview of the law."

2 Kent's Comm., p. 72.

(c) *No intelligent rule, applicable to all cases, can be drawn from the decisions since 1875.*

It has been held by the Supreme Court of the United States that a Chinese person cannot become a naturalized citizen under the laws of the United States of May 6, 1882.

Low Wah Suey v. Backus, 225 U. S. 460.

A more accurate statement than the earlier statements by Chief Justice Fuller, commented upon by Judge Lowell,

"That a native of China, of the Mongolian race, is not a white person within the meaning of the act of Congress."

In re Ah Yup, ubi supra.

That "a person of Mongolian nativity" was a native of China and cannot become a citizen (*In re Hong Yen Chang,* 84 Cal. 163); that a Burmese, being a Malay, "who under modern ethnological subdivisions are mongolians," is not eligible (sic.) (*In re San C. Po,* 28 N. Y. Supp. 383); that it "include members of the white or Caucasian race as distinct from the black, red, yellow and brown races" (*In re Alverto,* ubi supra); "The Caucasian race only" (*In re Akhay Kumar Mozumdar,* ubi supra).

"Is the applicant from Europe and a member of the peoples inhabiting Europe, and there regarded as white, or a descendant of an emigrant from them?"
In re Dow, 213 Fed. 355.

"It would not mean Caucasian."
Ex parte Shahid, ubi supra.

It would include persons on the European side of the Mediterranean, although racially descended from many sources, the generally received opinion being that they were white persons.
Dow v. United States, 226 Fed. 145.

It would not include a half white and half Indian, because not of the Caucasian race.
In re Camille, 6 Fed. 256.

Speaking of the section, Judge Lowell, from whom we have already quoted, sums up the whole matter:

"That section implies a classification of some sort. What may be called for want of a better name the Caucasian-Mongolian classification is not now held to be valid by any considerable body of ethnologists.

To make naturalization depend upon this classification is to make an important result depend upon the application of an abandoned scientific theory, a course of proceeding which surely brings the law and its administration into disrepute. Here it is impossible to substitute a modern and accepted theory for one which has been abandoned. No modern theory has gained general acceptance. Hardly any one classifies any human race as white, and none can be applied under section 2169 without making distinctions which Congress certainly did not intend to draw; e. g., a distinction between the inhabitants of different parts of France. Thus classification by ethnological race is almost or quite impossible. On the other hand, to give the phrase 'white person' the meaning which it bore when the first naturalization act was passed, viz., any person not otherwise designated or classified, is to make naturalization depend upon the varying and conflicting classification of persons in the usage of successive generations and of different parts of a large country. The court greatly hopes that an amendment of the statutes will make quite clear the meaning of the word 'white' in Section 2169."

In re Mudarri, 176 Fed. 465.

Turning now to the cases dealing with Japanese, Judge Colt held *In re Saito,* 62 Fed. 126, that the Japanese were excluded because Congress refused to extend naturalization to the Mongolian race, and classes Chinese and Japanese on the same footing.

Judge Hanford holds that Japanese are excluded because of

"the intention of Congress to maintain a line of demarkation between races, and to extend the privilege of naturalization only to those of that race which is predominant in this country."

In re Buntaro Kumagai, 163 Fed. 922.

He does not say what race the Japanese belong to, nor what race is predominant.

In the Bessho case Judge Goff would seem to exclude Japanese because not of the Caucasian race, and Judge Chatfield because

> "A person of the Mongolian race, either Chinese or Japanese, cannot be naturalized."
> *In re Knight,* 171 Fed.

The Washington court would seem to exclude them because the naturalization law applied merely to the Caucasian race, and that it had been held *In re Saito* that a native of Japan was of the Mongolian race. (*In re Yamashita,* 30 Wash. 234, 70 Pac. 482); and the Utah court held that a Hawaiian, not being of the Caucasian or white race, or of the African race, was excluded. The court seemed to include the Hawaiians as *Mongolians!* (*In re Kanaka Nian,* 6 Utah 259, 21 Pac. 993); Judge Maxey admitted a copper-colored Mexican, who aparently was an Indian of unmixed blood, holding that Judge Sawyer's decision might well be limited to members of the Mongolian race, and while the applicant would not be, by any strict scientific classification, classed as white, he fell within the liberal intent of the statute, as shown by the course of the United States Government in annexation and treaty, citing *Lynch v. Clarke,* ubi supra, as to the liberal policy. (*In re Rodriguez,* 81 Fed. 337.) Judge Maxey cites the Acts establishing territorial government for New Mexico and Utah, each of which use the expression

"free white" to describe those entitled to vote, but which in the same section clearly recognize, as included in that definition, Mexicans who are not white or of the Caucasian race (p. 352).

The policy of the United States has been to include into its citizenship by annexation vast numbers of members of races not Caucasian, including many Mongolian. The annexation of Hawaii converted thousands of Japanese, not to mention other nationalities, into American citizens. The most recent is the Porto Rico Act, which makes the Porto Ricans, who are as dark as the Japanese, American citizens.

The petitioner in the court below presented an incomplete list of fourteen naturalizations in various courts, and that court says it is understood that about fifty Japanese have been naturalized in State and Federal courts. (Tr., p. 23.)

VI.

THE WORDS "FREE WHITE PERSONS," NEITHER IN THEIR COMMON AND POPULAR MEANING, NOR IN THEIR SCIENTIFIC DEFINITION, DEFINE A RACE OR RACES OR PRESCRIBE A NATIVITY OR LOCUS OF ORIGIN. THEY DEAL WITH PERSONALITIES AND THE QUALITIES OF PERSONALITIES, AND ARE ONLY SUSCEPTIBLE OF MEANING THOSE PERSONS FIT FOR CITIZENSHIP AND OF THE KIND ADMITTED TO CITIZENSHIP BY THE POLICY OF THE UNITED STATES.

(a) The words deal with personalities, not with races, not with natives of any country or of any particular descent.

(b) The word "free" is an essential part of the clause. Under the old English law, it means a freeholder as distinguished from a serf. Under the Constitution, it is used in opposition to slave. It is a condition which the Declaration of Independence asserts all men are born to. Here, if it has any definite meaning, it imports a freeman a superior, as against an inferior class.

(c) "White" we have already sufficiently defined, and shown that the words "free white persons" had in 1875 acquired a signification in American statute law as expressing a superior class as against a lower class, or, to speak explicitly, a class called "white" as against a class called "black"; the white man against the negro.

VII.

THE JAPANESE ARE "FREE." THEY ARE "WHITE PERSONS," HAVING EUROPEAN AND ARYAN ROOT STOCKS. THEY ARE A SUPERIOR PEOPLE, FIT FOR CITIZENSHIP.

"Of one blood hath He made all nations," says Paul; and from the time of Aristotle, science, as well as religion, has taught a common origin of mankind, and many of the great races today unite in common blood variations from one cause or another and centering in that common blood. Even Blumenbach, who is the father of modern anthropology, says that

"Innumerable varieties of mankind run into one another by insensible degrees."

He invented the division into Caucasian, Mongolian, Ethiopian, American and Malay, of which the Britannica say, referring to the term Caucasian:

"The ill-chosen name of Caucasian invented by Blumenbach * * * and applied by him to the so-called white races, is still current; it brings into one race peoples such as the Arabs and Swedes, although these are scarcely less different than the Americans and Malays, who are set down as two distinct races."
2 Enc. Brit., p. 113.

On the other hand, Cuvier divides the races into Caucasian, Mongol and Negro, corresponding to white, yellow and black, but this is clearly not sufficient.

Huxley distinguishes four principal types of mankind, the Australoid, Negroid, Mongoloid and Xanthochroic ("fair whites"), adding a fifth variety, the Melanochroic ("dark whites").
2 Enc. Brit., p. 113.

but that work adds, page 114,

"The doctrine of the unity of mankind stands on a firmer base than in previous ages."

and Volume 9, Enc. Brit., p. 851, includes in the Caucasian race certain of the Brown Polynesian races, including Hawaiians and the Ainus.

In "Man Past and Present," Professor A. H. Keane, F. R. G. S., in the "Cambridge Geographical Series," describes mankind under four leading types,

which may be called black, yellow, red, and white, or Ethiopic, Mongolic, American, and Caucasic. He distinguishes Mongolians into three kinds: Northern, Southern and Oceanic, extending from Finland to the Philippines, and reckons the Japanese among the Northern Mongolians, whose color is thus described:

"Light or dirty yellowish amongst all true Mongols and Siberians; very variable (white, sallow, swarthy) in the transitional groups (Finns, Lapps, Maygars, Bulgars, Western Turks, and many Manchus and Koreans); *in Japan the uncovered parts of the body also white"* (p. 266).

The Encyclopaedia Britannica, Vol. 11, p. 635, commenting upon Professor Keane, says:

"The contrast between the yellow and the white types has been softened by the remarkable development of the Japanese following the assimilation of western methods."

The decisive test which modern science has applied is cranial measurements, and it is this test which has excluded the Japanese from the Mongolian division, although Dr. Munro, in a letter written at the very time of the delivery of the paper from which we will quote, referring to the fact that "Every human being is a mixture of root stocks," says:

"It cannot be said that the Japanese are a Mongolian race, but Mendel's rule holds good and one may see pure Mongolian forms sometimes. I have seen a pure Mongolian type in the child of an American Missionary (except the complexion and colour of the eyes) and this type is fairly common in East-central Europe.

"The preservation of a conventional racial type is a matter of aesthetics. What really counts in humanity is home influence and education, and where the ideals are high, the racial type is of little moment. But as the prejudice exists and as each nation has the right to choose its physique, the best plan, as it seems to me, would be for the Japanese authorities to make some selection, from the anthropological point of view, of those going to the States. With regard to the present case, I shall be glad to help if I can and would be glad to make an examination. The head form and facial indices would suffice."

It is a matter of common observation that the women of the Kyoto region in Japan, particularly the higher class, are white and not darker than a large proportion of the women of this country. In fact, the Ainu, who is admitted to be Caucasian, is the darker. The influence of climate and habit has had much to do with the matter of complexion. Ellis, in his Polynesian Researches, speaking of color, says that their infants are born but little darker than European children.

Hawks' Narrative of Commodore Perry's Expedition to Japan, published by order of Congress in 1856, is the first authoritative expression, and perhaps the only governmental expression, on the origin of the Japanese. He says:

"Kaempfer brings them from the plains of Shinar, at the dispersion. He supposes them to have passed from Mesopotamia to the shores of the Caspian, thence through the valleys of the Yenishi, Silinga and paralle rivers to the lake of Argueen; then following the river of that name which arises from the

lake, he thinks they reached the Amoor, following the valley of which they would find themselves in the then uninhabited peninsula of Corea, on the eastern shore of Asia. The passage thence to Japan, especially in the summer season, would not be difficult. He supposes that this migration occupied a long time. * * * This, if not satisfying, is at least ingenious. * * * Dr. Pickering, of the United States exploring expedition, seems disposed, from an observation of some Japanese whom he encountered at the Hawaiian Islands, to assign to them a Malay origin."

and speaking of their alleged Tartar origin, continues:

"But they certainly do not have the Tartar complexion or physiognomy. The common people, according to Thunberg, are of a yellowish color all over, sometimes bordering on brown and sometimes on white."

He also quotes the latter authorities as saying:

"That ladies of distinction, who seldom go out into the open air without being covered, are perfectly white. Siebold also, speaking of the inhabitants of Kiusiu, informs us that, 'the women who protect themselves from the influences of the atmosphere have generally a fine and white skin, and the cheeks of the young girls display a blooming carnation.' "

Doctor N. Gordon Munro, the greatest authority on Japanese ethnology, with Doctor Bally's work as a basis, has had much new material, which has been recently brought to light, on which to base his conclusions, including the work of Gowland, Tsuboi, Baron Kanda, Aston, Torii, Takahashi and Wada, and has recently been giving a series of lectures on

prehistoric and protohistoric Japan before the Asiatic Society of Japan. One of these, on "The Yamato Dolmen Age," delivered at Keio University on March 21, 1917, we will quote at considerable length. It is necessary to premise what Doctor Munro assumes, and which is a fact of comparatively recent scientific development, that the present Japan has two root people, the more northerly Ainu and the more southerly Yamato folk. It is generally conceded that the Ainu are of the white race and allied to the European people. Doctor Munro deals in this paper with the Yamato, saying:

"In respect to the personal investigation I have some justification in the knowledge that the demonstration of Ainu culture in the shellmounds of Honshu and Kyushu and of Yamato remains in shellmounds and stone age sites of the South is pioneer work, far from complete, but establishing the Ainu as aborigines and the Yamato root-folk as having also a birthright, if not as the prior autochthones of Japan * * *"

He then goes on to say:

" * * * at the risk of again overcrowding material I shall first show some representative pictures of material preserved in and by association with the sepulchres of the Yamato and shall folow this with illustrations of these sepulchres themselves. I shall then present some evidence of similar sepulchres and of magalithic monuments in Europe with a rough sketch map showing their prevalence in the Mediterranean area and through the Eurasiatic continent. * * *"

finding the immediate source of this culture in

"Korea, the proximate habitat of the Yamato invasion and immigration. From thence in all probability, came the virile forces of the iron wielding 'horseback domination' which ultimately united with the agricultural pre-Yamato folk of Kyushu and possibly around the Inland Sea."

where he thinks these people may have lived for a considerable time before invading Japan.

After referring to prototypes in Europe, in Egypt, in Greece and around the Mediterranean generally, he says:

"We must, however, leave such parallels in culture and I can steal only one minute from our remaining time to point out the course of the ancient Japanese concept the *Mitsudomoe,* which is here shown and which from these examples may be traced into China and thence into Babylonian culture and that of the Mediterranean prehistoric civilization, where it is found on the spindle weights of Troy. It was also familiar as the anthropomorphic concept in the sun in almost every land (Egypt perhaps excepted) conventialised from the biped concept as a sign of mankind."

and after describing the sepulchres themselves, and discussing whether there was any contact with China, he concludes:

"But it is not necessary to suppose that this 'Horse-back domination' ever came into close contact with the Chinese before settling in Korea.

"Where then did the dolmen originate? That is likewise uncertain. But we know where dolmens existed at a date long anterior to those in Japan. That was in North Africa and in Europe, where dolmens contain relics of the later stone age and the early metal phases of copper and bronze, but rarely

the least trace of iron. In Japan, on the other hand, the dolmens are of the iron age, with vestiges of the bronze period and mere traces of a stone age in conventional offerings."

and says there is something maritime in the location of the people of allied culture, and tracing this course he continues:

"This culture did not spread into Egypt, though there are two patches on the Nile, but it is found in Syria and Palestine round the Black Sea and between it and the Caspian, in the Caucuses and southern Russia whence it spread into Siberia in a mitigated form. It also entered Arabia, Madagascar and Persia, while in southern and central southern India it was established on an immense scale. Whether it reached India by sea or land is not yet certain, but traces at least are known in northern India and it has been followed into Burmah."

after which he still further concludes that it is maritime, referring incidentally to the remains on the Island of Ponape, described by Christian in his book on the Carolines, and says:

" * * * if we note the similarity of special designs and contrivances between East and West in prehistoric times, we have, I think, good ground for the belief that the dolmen culture of Japan was rooted in the Mediterranean area. It is a far cry from Japan to this area or to the region of the five seas, and it may be premature yet to insist on any limited area for the provenance of the Caucasian element in the Japanese people.

"Whether there was any connection between the Yamato root-folk in Kyushu and the infiltration of European stock into the Pacific which resulted in the

so-called Polynesian race, is another problem which is not yet ripe for solution. Any such connection must have been at a very remote age. * * *"

and in conclusion says:

"My opinion is that the Yamato root-folk of Kyushu and the present Polynesian people diverged from an Indonesian or other stock of European affinities in the very early stage of the neolithic or polished stone age, possibly in later palaeolithic times.

"The Korean contribution to the Yamato probably came not only from the southern coast of Asia and the islands near to it, but also through Manchuria, possibly migrating in part from the Caspian sea, and keeping north of the fortieth parallel. Otherwise it seems to me that this migration through Asia must have occurred before the Chinese civilisation had concentrated south of that latitude. I do not doubt that some Mongolian element had penetrated the islands to the south of Japan in ancient times; indeed, I have evidence of it. But I think this element was inconsiderable and that we must look to the soldiery and the agricultural serfs in the Korean immigration for the Mongolian component persisting in Japan. That this ingredient is present admits of no question, but that is a very different thing from the assertion that the Japanese are a Mongolian race. I affirm that the Japanese are not predominantly Mongolian. Physical anthropology teaches us that the Japanese, as we ourselves, are a mixture, a conglomeration of characters of primitive as well as of advanced mankind. If I have been at all successful in demonstrating this in my first lecture; if we have come to the conclusion that the Ainu are, if themselves mixed with other characters, an early European stock, that they have mingled to some extent with the Yamato stock, considerably in the South and noticeably in the North; if the considerations which I have just brought forward with regard to the European provenance of Yamato culture have any validity in con-

junction with the decided evidence of European traits in the physique of the modern Japanese, we cannot resist the conclusion that the word Mongolian is not a fit designation for the people of this land."

Little need be added to the tributes in the Senate of the United States, which we have quoted from the debate on the immigration Act of this year, but a summary of the history of the Japanese people during the last five or six hundred years by George Kennan, the distinguished traveler, which we take from The Outlook of June 27, 1914, is in point:

"At the beginning of the seventeenth century the Japanese were the most daring and adventurous navigators in all the Far East. Their insular position made them hardy and expert sailors, and they had at sea a natural intrepidity which was almost equal to that of the Northmen. At the very dawn of authentic history their ships were cruising along the coasts of China and Korea, and as early as the sixth century an armed Japanese flotilla sailed northward to what is now Siberia and ascended the Amur River for the purpose of invading Manchuria. * * *"

"Toward the close of the fifteenth century Japanese merchants began to extend their foreign trade to countries not previously visited, and as early as 1541 they had established commercial relations with more than twenty oversea markets, and were sending their ships to regions as remote as Java, the Malay Peninsula, Siam, and the western coast of India. In 1594, twenty-six years before our Pilgrim Fathers landed on the coast of Massachusetts, the Japanese had a regular line of merchant ships running to Luzon, Amoy, Macao, Annam, Tonquin, Cambodia, Malacca, and India, and making, without any great difficulty or danger, out-and-return voyages of from three thousand to twelve thousand miles. * * * They were quite capable of crossing the Pacific, and, as a matter

of fact, two of them did go to Acapulco and back in 1610 and 1613. The sailors who manned these vessels were not as experienced as were the Spanish and Portuguese navigators of the same period, but what they lacked in experienc they made up in enterprise, daring and resourcefulness. * * *

"All the Japanese of that time were imbued with an ardent spirit of daring and adventure, and long before the Mayflower sailed from Plymouth they had settlements, or colonies, in countries that are farther away from Japan than Massachusetts is from England. They took possession of the Luchu Islands, overran Formosa, helped the Spanish Governor of the Philippines to put down a revolt of the Chinese in Luzon, gained a strong foothold in Siam, and, fighting there in defense of the King, defeated invading forces of both Spaniards and Portuguese. Everywhere they were regarded as dangerous enemies, and in the library of Manila there is still in existence a copy of a letter written by a Spanish friar to his home government in 1592, warning the authorities of Spain that the Japanese were 'a very formidable people,' and that their great Shogun, Toyotomi Hideyoshi, was likely to invade the Philippines as soon as he had finished the conquest of Korea. * * *

"There is a widespread popular belief that in the Middle Ages, and, indeed, long after the Middle Ages, the Japanese were an uncivilized if not a barbarous people; but this belief is based wholly on ignorance or misapprehension of their history and institutions. * * * As early as the seventh century the Japanese had schools, and before the beginning of the eighth they had established in Nara and Kyoto Imperial universities with affiliated colleges and courses of instruction in ethics, law, history, and mathematics. The oldest university in Europe, that of Salerno, in Italy, was not founded until one hundred years later. The Japanese opened a great public library at Kanazawa in 1270, and established their first astronomical observatory more than a century before Commodore Perry entered Uraga Bay.

"Even in the field of material achievement, the mediaeval Japanese were pre-eminent. They would have regarded our invasion of Cuba with a force of 16,000 men as a very trivial affair. In 1592 their great leader, Hideyoshi, transported 200,000 men across the Tsushima Strait to Korea, and his first army corps, under General Konishi, marched 267 miles in nineteen days, fighting one pitched battle, storming two fortresses, and carrying two strongly-intrenched positions by assault. General Shafter was never more than eighteen miles from his sea base, while General Konishi, with Hideyoshi's first army corps, went 400 miles from his base at Fusan, and maintained intact through a hostile territory a line of communications. * * *"

VIII.

THE JAPANESE ARE ASSIMILABLE.

The debates in Congress and the literary controversies embodied in many books and articles on the Japanese question reduce the objection to Japanese naturalization to the claim that they are "non-assimilable." (Senator Phelan, p. 284; Senator Works, p. 228.) This means that it is impossible for them and undesirable for us to have them adapt themselves to western ideas. This is a reversal of our traditional national policy, for it was President Fillmore who sent Commodore Perry to overturn the Japanese policy, which sought to prevent assimilation, and open up Japan to western civilization. The first article of the Perry treaty of 1854 declares:

"There shall be a perfect, permanent, and universal peace and a sincere and cordial amity between the United States of America on the one part, and

the Empire of Japan on the other, and between their people respectively, without exception of *persons* and *places*."

Having given Japan the bread of western civilization, shall the Japanese be forbidden to eat it? In view of the last sixty years, the charge is ridiculous. In what respect are they non-assimilable? Do they not have high ideals of honor, of duty, of patriotism, of family life, of religion and of social duty, and do they not adhere to these better than we do? The dignity of manhood is held up by the Declaration of Independence as the highest ideal of Americanism. How about our treatment of the black man in the south, or the Oriental in the west? In art and literature, the criticism of the Japanese today is of the abandonment of their ideas, and too easy adaptation of western methods. In religion, Buddhism and Shintoism have been infused from some source so strongly with Christian ideals that their followers do not see the contrasting splendor of the Christian faith as strongly as awakened Korea does. Of course, they have a race prejudice, but nothing compared with that of the Jew, whom we gladly welcome and protect even in foreign lands, who sits in the halls of Congress, in our highest courts, amongst our executives, in the marts of trade. Naturally, a Japanese prefers to marry a Japanese, not only on account of race prejudice, but for other obvious reasons; but they do intermarry with whites, and the almost uniform testimony is that they have happy families and vigorous progeny, preeminently Ameri-

can. Section 2169 authorizes the naturalization of black men, but half the States forbid marriage between whites and blacks.

We would hardly require the Japanese to assimilate our manners, for their manners, particularly those of the women, are far superior to our own. If, as seems true, the only argument against the fitness of the Japanese for naturalization is their non-assimilability, the argument is ended, for it is preposterous to claim that a nation which has shown itself to have the greatest capacity for adaptation, against whom the severest criticism is that they are imitators, is not capable of adapting itself to our civilization.

It cannot be said that the Japanese do not come to make a home, or that they have not that earth hunger which led our ancestors to cross the sea. The earth hunger of the Japanese and the wish to make a home is the objection of California. It cannot be said that he lowers the standard of living. The "drastic investigation" authorized by the California legislature of 1909 found that the Japanese employed by white farmers were paid as much as white laborers, and that the Japanese paid more than the white man.

Race prejudice will always exist. It is innocuous in Hawaii, where the variety of race prejudices renders any dominant race prejudice impossible.

Finally, the change in the last fifty years in the

habits, attitude towards the world, and the Constitution of Japan is a sufficient answer.

The story of the Japanese in Hawaii is significant. They are estimated to comprise 97,000 out of a population of 228,771, exclusive of the army and navy (Report of the Governor of Hawaii to the Secretary of the Interior, 1916, p. 4), or 42.5 per cent.

In business, the report shows that out of 1780 independent houses of business in Honolulu the Japanese have 754; while in Hilo, out of 398, they have 248, or 1002 out of 2178, 46 per cent—slightly higher than the proportion of population.

The Japanese have the lowest percentage of convictions of crime in proportion to population, namely, 2.39 per cent, excepting the whites (including the Portuguese), who have 2.26 per cent. Excluding the Portuguese, the whites would have a higher percentage (p. 74); and the Japanese convictions are chiefly, like the Chinese, for gambling. Thus, the Japanese, although having 42.5 per cent of the population, have but 13.31 per cent of the prisoners, less than a third in proportion (p. 77). Of the delinquent and dependent boys and girls brought before the Juvenile Court, there were only 54 Japanese, or 9 per cent, whereas the proportion of population is 42.5 per cent. If convictions for gambling are eliminated (see report of the Chief Justice to the legislature), there are 1794 convictions of whites (including Portuguese), with an estimated population of 35,322, to 1686 convictions of Japanese. In other words,

(gambling aside) there are three white convictions to one Japanese, in ratio to population.

Much has been said about the picture brides and divorces, but from the records of the Circuit Courts of Hawaii, in the same report of the Chief Justice, it appears that in 1916, 379 divorces were granted in the Territory, 193 of which were Japanese, but 8 per cent larger than the percentage to population. This result should be surprising to one who is not familiar with the care which is bestowed on marriage by that method.

Mr. M. M. Scott, for thirty-five years head of the High School in Honolulu and known to every student of the Japanese, says of their racial origin and assimability, in a memorandum summing up what he has published at various times:

"The Japanese people are classed as Mongolians by those who know absolutely nothing about physical anthropology. Those physical anthropologists that have studied bodily characters of the Japanese, all agree that they do not belong to the Mongolian race, whose main habitation is in Central Asia. Kaempfer, Titsignh, Von Rein, Morse and Bachelor, who were all skilled anthropologists, feel sure that whatever mixture there may be in their racial stock, Mongolian blood is not the predominant, nor even a large element in the Japanese. Not one of them would be rash enough to say what element of blood is the predominant one. The Japanese are a very mixed race, as any one may observe who travels from the extreme north to the extreme south of their elongated Empire.

"I have been acquainted with the Japanese people for forty-five years. I was, by invitation of the Japanese government, for ten years from 1871 in their

service in establishing a system of elementary schools throughout the country. In no one physical character do the Japanese people correspond to a like physical character of the true Mongolian. Neither in color of skin, nor pigment, nor stature, nor in measurement of limbs, above all, in 'cephalic index,' the surest character to determine race, can the Japanese be called Mongolians.

"First as to color of skin. In certain parts of Japan, regarded by their own ethnologists, the skin and pigment therein are more nearly white than yellow or brown. In the town of Sendai, in the north of the main island, the skin of the children and the women not in the fields would be taken by strangers, as belonging to the white race, rather than to any of the classified colored races. Likewise, in the typical Japanese city of Kyoto, those not exposed to the heat of the summer sun are particularly white-skinned. They are whiter than the average Italian, Spaniard or Portuguese.

"As before mentioned, the one character regarded by all anthropologists as the main one, is the 'cephalic index.' Now, the 'cephalic index' of the average Japanese corresponds more nearly with the Central European skull than it does with Chinese or Mongolian. The 'cephalic index' is from eighty to eighty-two, about the same as the great Germanic race. The modern anthropologist, Ratzal, regarded the world over as one of the most distinguished on this subject, agrees with the earlier writers mentioned in the foregoing part of this sketch. As to the possibility of assimilation to American standards of governments and all other things American, I regard the Japanese as one of the most assimilable of all the races of man, or what is known in the United States as the 'New Immigration.' Truth to tell, since the Japanese have become a settled people, ethnically homogeneous, they have been assimilating everything they were shown from other nations. For a thousand years, with no intercommunication, except slight ingress and egress with China and Korea,

they borrowed from China and Korea letters, literature and the art of porcelain making. They have improved by their peculiar genius on everything they borrowed from these two places.

"Since the opening of Japan by Commodore Perry in 1854, treaties and communications with Western Nations have enabled the Japanese to assimilate science, industries, commerce, and politics with a rapidity that no other nation has ever shown. Their students are great admirers of American governmental forms, and even social forms. There is an immense body of men today in Japan urging a democratic and constitutional government on the model of that of the United States. There is no question but in a brief time their forms of government will be as liberal and democratic as those of England and the United States. They are immensely loyal—loyal to family and loyal to properly constituted government. Those Japanese born and nurtured in Hawaii are as much American as the children of the descendants of the Pilgrim Fathers that came to this country to Christianize the Hawaiians. Let me repeat, and I measure my words in so doing, with nearly a half century of study and association with the Japanese, that I am persuaded that they will make as loyal and patriotic American citizens as any that we have."

CONCLUSION.

In conclusion, we ask this court to give to the great question submitted the informed and discriminating consideration which it deserves but has not yet received, and we confidently hope that such consideration will lead the court to hold that the United States, after extending a hand to welcome to its civilization a great and then well-contented people, did not coldly withdraw that hand, on the ground that

they were among the undesirable and outcast of earth.

DATED, Honolulu, T. H., May 1, 1917.

Respectfully submitted,

DAVID L. WITHINGTON,

JOSEPH LIGHTFOOT,

Attorneys for TAKAO OZAWA, Petitioner.

CASTLE & WITHINGTON,

LIGHTFOOT & LIGHTFOOT,

Of Counsel.